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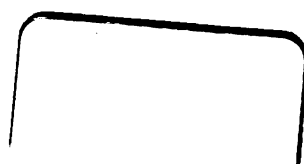
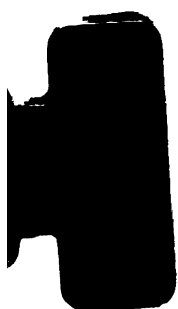
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A TREATISE
ON THE LAW
OF
HUSBAND AND WIFE.

BY
JAMES SCHOULER,
AUTHOR OF TREATISES ON "PERSONAL PROPERTY," "BAILMENTS,
INCLUDING CARRIERS," ETC.

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P R E F A C E.

THE ground-work of the present volume on the law of Husband and Wife will be found in a treatise of some three hundred pages which the author's earlier work on the Domestic Relations contains. But when that treatise was written, the Married Women's Acts in England and America were a sort of first experiment or agitation; and since the second edition of the Domestic Relations not less than three thousand points have been decided, all tending to establish a modern jurisprudence concerning married women's rights, which decisions the author has examined while preparing the present work, in addition to earlier authorities and various local codes. He has consequently expanded his subject, re-arranged his plan, and revised and re-written every topic, and the present work will be found essentially a new one, so far as relates especially to Promises to Marry, the Wife's Separate Property under Equity and Recent Statutes, Transactions between Husband and Wife, Various Matters of Practice, and Separation and Divorce. A summary of the late Married Women's Acts in England and the United States will be found in the Appendix.

No one can gain an intelligent comprehension of the rights and disabilities of the marriage union, as they exist to-day, without examining in order, (1) the old common-law or coverture doctrine; (2) the modification of that doctrine by equity and recent legislation; (3) the latest local statute (judicially construed or not) which bears upon the particular point. To facilitate such an examination in due historical sequence is the main object of the present work.

J. S.

March 1, 1882.

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HUSBAND AND WIFE.

PART I.

INTRODUCTORY CHAPTER.

§ 1. **The Marital Relation; its Primitive Institution.**—The relation of husband and wife is the most interesting and important among what our law designates as the domestic or family relations. Its institution, as both history and reason teach us, must have been coeval with the formation of society. The Vedas, the oldest known writings in the world except the Pentateuch, exhibit the sexes thus associated, and in the Pentateuch the first man and woman are likewise described as the first married pair. Lucretius embodies in verse the speculations of the ancients, to the effect that the ferocious manners of our human race did not begin to soften until one woman was joined to one man in chaste nuptials, and they recognized their own offspring.¹ Nor does modern poetry depict the mutual endearments of conjugal life more beautifully than did the hoary wanderer, earliest of classic bards, in the parting of Hector and Andromache.² The institution of marriage gives scope and stability to the parental and filial connection, whence branch out those wider relations which the individual sustains towards society.

§ 2. **Marriage Antecedent to Human Laws; Marriage and Property.**—Marriage, we may well presume, has its foundations in human nature, and is not the invention of legislators. Not only is the sexual impulse found common to man and

¹ Lucretius *De Rerum Natura*, l. v. 1009 *et seq.*

² *Iliad*, Book vi.

the brute creation, but among many animals of the higher grade, whose homes are their own contrivance, we see the instinct of selection manifested, and mates abiding faithfully together. In order that the human race might be safely cradled and fitted for its far higher functions and destinies, we cannot doubt that a similar principle of individual selection was divinely implanted in man and woman, and that, however disobeyed in a rude and rebellious state of society, its moral obligations were recognized as paramount from the very first, and speedily enforced by whatever served as public authority. The universal human heart throbs with desire of conjugal companionship, home, tender offspring; yearnings more passionate, perhaps, in the young and undisciplined, than among those tutored by wisdom, experience, and civilized intercourse. This desire, or the sexual love, seeks to appropriate its object, the mate with whose association those yearnings may be realized; and in this appropriation consists marriage.

The primitive marriage ceremony seems to have partaken of the formalities usual in transferring property, the father giving his daughter for a certain price, and the husband, upon payment, taking full possession. The laws of marriage and of property are, in fact, very closely blended; for, besides this analogy, which runs through the whole family relation, we perceive in the increasing necessities of one's home and man's spontaneous wish to provide amply for wife and children, and transmit his worldly goods to his own posterity, the very strongest incentive to personal enterprise, and the acquisition of property. The wealth of a State consists mainly in the aggregate wealth of its population; private affection is at the foundation of the public virtues; and the great motive power of civilization is generated in the family nest.

§ 3. **Marriage Systems vary; Monogamy; Length of Union, &c.** — At the same time we must admit of marriage that human systems vary in fixing the rights and obligations as well as in the modes of constituting that relation. As to the number of partners of the opposite sex one may have together, some codes, those of the East particularly, and warm latitudes, have sanctioned a plurality of wives; partly, doubtless, to pamper the sexual appetite of their nobles, — since the privileged

class alone can maintain the establishment. In this sense, rather than a reciprocal one, the word polygamy is commonly employed; for though polyandria is not, perhaps, unknown in the world, it never really flourished, since the wife of many husbands, even supposing the tolerance of her spouses, could hardly respect her own person sufficiently to believe herself married at all. Jealousy of rivals, which in polygamous marriages woman may suppress, through fear of her lord, but cannot eradicate, is a fact of human nature which, like the statistics of sexual division on the globe, should argue for monogamy, as nature's true institution. Monogamy is the rule of enlightened nations, and on the whole, the practice of humankind; polygamy being merely permissive after all, and only afforded to rich men at the cost of the poor.

Under most codes, the length of the marriage state is nominally fixed for life, as its security and the welfare of offspring sternly demand. But causes for divorce or putting away a spouse have always been reserved; that most universally recognized being the adultery of the wife. Temporary unions, more or less dignified in name, are not wholly unknown in jurisprudence, being semi-matrimonial, however, at best;¹ and the logical consequence of regarding marriage as founded in the mere civil contract of the parties (to which the present writer does not assent), must be to admit of its dissolution whenever such is their mutual wish and both are tired of the union.

§ 4. Connubial Happiness and the Codes inconsistent; Ancient Institutions.—In the connubial joys to which every age and nation bears witness, the vast majority of this globe's inhabitants must have participated from one era to another, with a

¹ Van Lennep says that among certain Moslems in the East it is a common practice to marry for a limited period; the parties who enter upon this relation agreeing to live together for a fixed period, which varies from a few days to ninety-nine years, and the contract being regularly drawn up by the judge and signed by witnesses. Van Lennep's Bible Lands. But this practice, which he admits is confined to the transient residents of large cities, ap-

pears hardly more worthy the epithet of marriage than the quondam custom among merchants in New Orleans, at the annexation of the Louisiana territory to the United States, of taking quadroon mistresses and treating them with some sort of honor. The line between legal marriage and legalized concubinage must be a difficult one to draw where the marriage union is not for life.

certain voluntary adjustment of the reciprocal burdens, such as relieved both husband and wife of a sense of bondage to one another. And thus have the inequalities, the hardships of marriage codes, proved less in practice than in literal expression. For whatever the apparent severity of the law, human nature or love's divine instinct works in one uniform direction, namely, towards uniting the souls once brought into the arcana of married life, in an equally honorable companionship. Woman's weakness has been her strongest weapon; where her influence could not overflow it permeated; and if her life has been, legally speaking, at her husband's mercy, her constant study to please has kept him generally merciful. She has not been superior to her race and epoch, but on the whole as well protected, as well advanced, in her day, as those of the other sex. Except for this, the wife's lot must have been miserable indeed, even under the most civilized institutions ever established. Codes and the experience of nations in this respect show strange inconsistencies: laws at one time degrading to woman, and yet marital happiness; laws at another elevating her independence to the utmost, and yet marital infelicities, lust, and bestiality.

Marriage, among the ancient nations, and in the rudest types of modern society, tends to seclude from the world the individual woman at an early age, that she may with docility fulfil the desires of her lord and bear him children. He may be a polygamist and enjoy concubines, but her chastity, her singleness of devotion, is rigidly insisted upon. His life may be public, but hers is strictly private. He sits in the market-place while she stays at home; her veil disguises her features whenever she goes abroad; domestic service, cookery, trifling accomplishments, constitute, with religion, her sole education. Her daughters she trains up to be as compliant to man's rules as herself; and her husband, meantime invested with the power of life and death over wife and daughters, is applauded by society if he slays the former when she is guilty of adultery. In the East, among both Jews and Moslems, the husband is to this day permitted to divorce his wife at sole discretion, being merely required to give her a writing which states the fact and the cause of casting her off;

and the only native women with genuine social freedom in India have been the prostitutes.¹

Nevertheless, inclination aids religion in keeping the Eastern widow reverential towards her deceased spouse; for his sake the Hindoo relict devotes the rest of her life to misery, and, until the British government interposed, against her own wishes, would burn herself upon his funeral pile. Jewish history supplies illustrious examples, from both sexes, of domestic love and confidence. And the most superb mausoleum this world contains was built by a sovereign of India to commemorate to posterity the virtues and worth of his departed spouse.²

§ 5. **Marriage under Roman Laws.**—The Roman empire, the successor of a once robust republic, absorbed gradually into its jurisprudence all the treasured wisdom of the heathen world. Here we may contemplate the most remarkable series of experiments ever performed upon the institution of marriage. Polygamy was unknown; and by solemn rites emblematic of the mystic union of mind and body, the individual man and woman were set apart for one another in primitive times to become partners for life. But in those earlier rude but progressive centuries, both under Numa and the Consuls, the Roman union was legally unequal; the husband took a young girl in marriage when he could readily mould her to his will, and exercised the Oriental jurisdiction of life and death, being lord of her person and sole master of her acquisitions. In the new servitude which she embraced when she left her father's house to become a *mater-familias*, the Roman maiden acquired, as Gibbon expresses it, the strange character of sister to her own children and of daughter to her husband and master.³ Nevertheless, all contemporary narratives attest the purity of domestic life among the republican Romans, the health and vigor of their progeny, and, what is of more significance, the strong and wholesome influence which woman exerted in the family as educator of both husband and children, and in the State itself. Rulers were deposed and the government reconstructed to avenge the sullied honor of a wife or

¹ See Van Lennep's Bible Lands;
Butler's Land of the Veda.

² Ib.

³ 4 Gibbon's Rome, ch. 44.

virgin daughter. So powerful had woman's influence become after the Punic triumphs, and in the palmy days of the republic, that her wishes were indulged for a freer and more equal marriage relation before the law. The old nuptials, formerly celebrated by the pontiffs, fell into disuse; and man and woman subscribed to a marriage contract which protected the wife's estates against the husband, prohibited mutual gifts, and rendered the misconduct of either spouse a just ground for legal redress. Marriage and religion now became in a measure disconnected, and the sexes embarked their affections for the first time upon a sort of rational partnership for conjugal purposes, wherein the more delicate spouse became transformed from legal pupil to legal companion of the stronger.¹

From this new experiment might have been anticipated the happiest results: mutual elevation and refinement, the household directed by a combined intelligence, children born and reared under equal parental counsels, connubial peace fortified by justice, the adoration of woman increasing as her angelic mission to society became enlarged. Such, however, was not the actual issue. The depravity of one sex increased with the depravity of the other. Matrimonial interests clashed; the sanctity of the home declined rapidly; the humbler conjugal duties were ill performed; upon unwelcome children were visited the sins of parents who had married out of ambition, pleasure, the greed of dowries, or absurd caprice, and who rebelled equally at a touch. For more than five hundred years previous, the husband had scarcely ever exercised his tyrannical privilege of putting away the wife; but now, the novel principle becoming established that marriage, like other contracts, might be readily rescinded for cause on either side, the divorce practice became enlarged, to the disgrace alternately of one and the other spouse, until long after the republic had collapsed under the prodigious load of marital unfaithfulness, gross materialism, sensuality, unbridled desire, a mouldering patriotism, and that universal corruption of manners and morals which foreign conquest hastened rather than retarded, a line of Roman emperors

¹ 4 Gibbon's Rome, ch. 44.

might be seen relaxing and repressing in turn the license of divorce, and applying various nostrums to the diseased core of society. Males were obviously reluctant to marry when Augustus urged them on the subject. Restrained, moreover, by maxims which equally forbade incest and foreign intermixture, so far as contracting legal marriage was concerned, the proud Roman citizen had meantime habituated himself to concubinage, enjoying in the companionship of some faithful consort of humbler rank many of the comforts usually associated with domestic life without risking his independence upon an equal marriage with an imperious woman of his own station. It was by means of this secondary sort of union, which for nine centuries of the empire scandalized the noble matrons of Rome, that men manifested their natural preference for partners in life whom they might command, but to whose faithfulness and soft endearments their hearts were sure to yield. The philosophic Antonines, best of rulers, set the example of such connections; and the concubine, inferior in station doubtless to the wife, but yet far superior to the prostitute, saw her offspring sometimes legitimated by later nuptials or an act of adoption, and legally distinguished under all circumstances from the miscellaneous procreation of those vile, child-destroying times by the epithet of *natural*, and by partial rights of legal succession.¹

“A specious theory,” observes the historian, “is confuted by this free and perfect experiment, which demonstrates that the liberty of divorce does not contribute to happiness and virtue. The facility of separation would destroy all mutual confidence and inflame every trifling dispute; the minute difference between a husband and a stranger, which might so easily be removed, might still more easily be forgotten.”²

Whether, in setting at naught that identity of interests which is essential to domestic happiness, the later Roman scheme was fatally defective, or this conjugal decay was due to causes more latent, need not here be discussed. Certain it is, however, that wide-spread incestuous intercourse, licentiousness most loathsome and unnatural, followed in the

¹ 4 Gibbon's Rome, ch. 44.

² *Ib.*

wake of marital independence; and as the interests of husband and wife began to diverge, the bonds of family affection became weakened. When the empire sank into utter dissolution, woman possessed a large share of cultivation and personal freedom; yet she had touched the lowest depths of social degradation.

This degradation it became the mission of the Christian Church to correct during the lapse of the dark ages, by restoring the dignity of marriage, — exalting it, in fact, to a sacrament, and almost utterly prohibiting its dissolution. The community or partnership system, moreover, which applies in modern times to the property of a married pair in countries like France, Spain, and Italy, where the influence of the Roman jurisprudence continues, is something distinct from the civil law of separate property which prevailed in the age of Justinian.¹

§ 6. **The Marriage Relation in the English and American Law; Property Rights.** — The law of England and the United States, on this topic, is now undergoing a remarkable change; and so unsettled are its principles at the present time, with reference to the rights and obligations of the married pair, that the writer has felt constrained to depart somewhat from the usual plan of law treatises, adopting what might be termed a consecutive or historical arrangement of his materials; since otherwise the subject would furnish to the reader's mind little else than a series of unreconciled contradictions. To show clearly why the later cases conflict with the earlier will at least aid the future legislator and jurist in their efforts to place the law of husband and wife upon a firm and just basis; and meanwhile afford to the practising lawyer all the assistance which he can reasonably expect.

As to Property Rights. This confused state of the law of husband and wife is exhibited in a contest still going on between two opposing schemes for adjusting the property rights of the married parties. The one is the common-law scheme; the other resembles that of the civil law. The former is at the basis of our jurisprudence, English and American. The

¹ See 1 Burge Col. & For. Laws, 202, 263; Community, *post*.

latter has had a powerful influence in modern times, moulding the doctrines of the equity tribunals and shaping recent legislation. Let us examine these schemes separately.

(1). The common-law scheme makes unity in the marriage relation its cardinal point. But to secure this unity the law starts with the assumption that the wife's legal existence becomes suspended or extinguished during the marriage state; it sacrifices her property interests, and places her almost absolutely within her husband's keeping, so far as her civil rights are concerned. Her fortunes pass by marriage into her husband's hands, for temporary or permanent enjoyment, as the case may be; she cannot earn for herself, nor, in general, contract, sue, or be sued in her own right; and this, because she is not in legal contemplation a person. } The husband loses little or nothing of his own independence by marriage; but in order to distribute the matrimonial burdens with some approach to equality, the law compels him to pay debts on his wife's account, which he never in fact contracted, not only where she is held to be his agent by legal implication, but whenever it happens that she has brought him by marriage outstanding debts without the corresponding means of paying them. Husband and wife take certain interests in one another's lands, such as curtesy and dower, which become consummate upon survivorship. In general, their property rights are summarily adjusted by the law with reference rather to precision than principle. On the whole, however, the advantages are with the husband; and he is permitted to lord it over the wife with a somewhat despotic sway: as the old title of this subject — *baron and feme* — plainly indicates. The witty observation is not wholly inappropriate that, in the eye of the common law, husband and wife are one person, and that one is the husband.¹

(2). The civil-law scheme, as we have observed, pays little regard to the theoretic unity of a married pair. It looks rather to the personal independence of both husband and wife. Each is to be protected in the enjoyment of property rights. In the most polished ages of Roman jurisprudence

¹ See Common-Law Rights of Husband and Wife, *post*.

we find, therefore, that husband and wife were regarded as distinct persons, with separate rights, and capable of holding distinct and separate estates. The wife was comparatively free from all civil disabilities. She was alone responsible for her own debts; she was competent to sue and be sued on her own contracts; nor could the husband subject her or her property to any liability for his debts or engagements.¹

Moreover, the civil law allowed agreements to be made by which property rights of a married pair might be regulated and varied at pleasure. And by their stipulations the married parties might so enlarge their respective interests as to provide for rights to the survivor.² These agreements were not unlike the antenuptial settlements so well known to modern equity courts.

What are familiarly known as the "married women's acts," the product of our American legislation since 1848, and more recently engrafted upon the code of Great Britain, aim to secure to the wife the independent control of her own property, and the right to contract, sue, and be sued, without her husband, under reasonable limitations. These acts, therefore, substitute in a great measure the civil for the common law. It may be laid down that the common law, in denying to the wife the rights of ownership in property acquired by gift, purchase, bequest, or otherwise, did her injustice, and that a radical change became necessary; and this is shown, not only in the legislation of our States, but by the fact that the equity tribunals gradually moulded the unwritten law of England so as to secure like results.

All this separate property legislation, as well as the equity doctrines pertaining to the subject in England and the several United States, will be duly set forth in these pages hereafter, so far as the chaotic condition of the law at this transition period will permit.³ And the modification of the respective property rights of a married pair by marriage contracts or settlements will also be considered.⁴

¹ 1 Burge Col. & For. Laws, 202, 263.

² *Ib.* 272.

³ See *Wife's Separate Property*, hereafter.

⁴ *Marriage Settlements*, *post*.

§ 7. **The Same Subject; Modern Tendencies towards Marital Independence.** — This enlargement of the property rights of a married woman leads, in the United States, to practical abuses, of which we shall speak under the appropriate head, but regarded by itself cannot be pronounced mischievous, so long as legislators and courts pursue their new course with circumspection. For should men of self-respect, avoiding collision with rich wives, turn, as a last resort, to poor girls instead, our marriage relation would be blessed indeed. One great danger to be apprehended, however, from all legislation of this sort is that it will weaken the ties of marriage by forcing both sexes into an unnatural antagonism, teaching them to be independent of one another and to earn their own living apart; another, that vulgar ambition and sensuous desire will corrode the hearts of both man and woman, overlaying the better impulses of their being. The raging sexual passion will be fed, but not the sacred flame. Individualism will usurp the place of Idolatry. Minds desirous of moving worlds will despise love and the quiet hearthstone.

And such, indeed, has been the later tendency in the United States, as we may assume it to have been in the Roman commonwealth. We are taught to regard our married women's property acts as part of a social revolution similar to that which Cato the Censor vainly resisted two thousand years ago. Partaking, in this great modern republic, of the impulses of the age towards freedom of the individual, woman is seen advancing her standard and demanding what no government ever yet accorded, and human nature itself proscribes, — that in the community all men be regarded as brothers and all women as sisters, and that the sexes be allowed to jostle through life shoulder to shoulder, all persons working out the manifest destiny of this three-score span with equal opportunities. Equal opportunities, indeed; the one untied, the other wishing to regard that as a physical incident which nature makes the chief function of her life. It is not equality, but superiority, of which proud spirits are emulous. Legislators, however, yield one point after another, some from conviction of justice, more from policy, or that very courtesy

to the sex which contradicts their professions. Education moulds the intellect while it refuses to cultivate the morals. Religion is kept at the gate until the liberal mind can weigh impartially the respective merits of Brahminism, Atheism, and Christianity, which it never will, because the investigation is irksome. The penurious farmer is encouraged by his own daughters to let them see life ; he throws them upon the world, like his sons, to sink or swim, and gets rid of their support. Youths of both sexes forsake home and the simple pleasures of the country, and hurry to the perilous allurements of the populous cities. As clerks, shop-waiters, factory operatives, but by no means in domestic service, American women mingle promiscuously with men, and the sexes throng in every avenue to public or private preferment, the one cheapening the service of the other, all rivals and fellows, with the slightest possible barriers to a dangerous intimacy. Licentious prints inflame the passions; the press propagates festering scandals; women discuss upon the rostrum, before a mixed audience, social problems at whose mention their grandmothers would have blushed.

With all this sexual freedom, we find that, while intemperance may have decreased in the United States, licentious crimes are on the increase; some theorists, indeed, upholding, in the spirit of freedom, the right of prostitution by common consent of parties. Marriages, too, are inconsiderate; divorce laws become lax, and divorce is constantly invoked to free those from the compact whose self-will, petulance, sordid taste, or roving passion furnishes no slight element towards rendering the matrimonial life unhappy. In the regulation of the household, the choice of visitors or guests, and the education of children, the conjugal pair pursue a distracted rule. Even the property acts of our States tend to loosen the marriage singleness of purpose, by encouraging the wife to go out one way to make her fortune while the husband goes another to make his; a policy commendable, perhaps, in theory, but in practice perverting the rule of nature that the one who bears and nurtures the children and cares for the home has not only a sphere which she alone can fill, but earns rightful support from the other, whose out-of-door toil is manliest

when bestowed in order that wife and children may share in the recompense.

There is no social stability, no inseparable barrier between barbarians and the civilized. The race vigorous in mind and body rises to predominance, and sinks when that vigor is lost. Tacitus saw in the savage Germans not the Romans' masters, yet a race of men who respected the counsels of their women and loved them with tenderness.¹ But the freedom of the German wife was not that of the Roman. Later still, the Anglo-Saxon home has been proverbial for peace and purity, with the man as the "house-band," binding all parts together. Marriage, notwithstanding all the female disabilities of coverture, stood well at the common law. Nor is it probable that, in the American Union, well-ordered households, happy spouses, thriving offspring, are now in greater proportion to the population than at the commencement of this century. On the contrary, the progress of the present experiment in sexual freedom strikingly resembles that of Rome. In New England, where the woman's cause receives the strongest intellectual impulse, and females outnumber the males in population, the proportion of divorces to marriages has alarmingly increased between 1860 and 1880; men, and probably women, incline more and more to celibacy, while among those united in wedlock the size of the family decreases. Couples whose parents and grandparents had families of a dozen or more children produce now hardly more than one or two.² What makes the parallel more marked, continence has not accompanied the condition of celibacy. Apart from the abandoned criminal class stand the women divorced from unhappy marriages, and maidens who are pushing in life for themselves, both classes assailable because deprived of those social safeguards which all their sex need. One perceives in public comparatively little of that manly courtesy and deference to ladies which was formerly characteristic of Americans. Meantime, as statistics show us, in-

¹ Tacitus, Germ. 8.

have commented upon these startling

² See, as to Divorce, *post.* Dr. T. D. Woolsey, Dr. Nathan Allen, and others in various recent publications statistics. See "North American Review," June, 1880.

fanticides and abortions multiply and the number of children born out of wedlock increases in proportion. In a word, indications are strong that in an old settled section of this Union, where the marriage relation was once remarkably pure, as well as prolific, men, as in the age of Augustus, are beginning to decline marriage for the sake of concubinage. Their selfishness declines the responsibilities, and their self-respect the possible mortifications, of wedlock with a dual government. Nor, probably, is this the drift of social events in New England alone.

§ 8. *General Conclusions concerning the Marital Relation.* — The conclusions to which the writer's investigation upon this subject conducts him are these. Marriage is a relation divinely instituted for the mutual comfort, well-being, and happiness of both man and woman, for the proper nurture and maintenance of offspring, and for the education in turn of the whole human race. Its application to society being universal, the fundamental rights and duties involved in this relation are recognized by something akin to instinct, and often designated by that name, so as to require by no means an intellectual insight; intellect, in fact, impairing often that devotedness of affection which is the essential ingredient and charm of the relation. Indeed the rudest savages understand how to bear and bring up healthy offspring. Legal and political systems are accretions based upon marriage and property; but in the family rather than individualism we find the incentive to accumulation, and in the home the primary school of the virtues, private and public. At the same time, marriage affords necessarily a discipline to both sexes; sexual indulgence is mutually permitted under healthy restraints; woman's condition becomes necessarily one of comparative subjection; man is tamed by her gentleness, and the helplessness of tender offspring, and for their sake he puts a check upon his baser appetites, and concentrates his affection upon the home he has founded. Such is the conjugal union in what we term a state of nature. And now, while man frames the laws of that union, as he always does in primitive society, he regards himself as the rightful head of the family and lord of his spouse; and, somewhat indulgent of his own errant

passions, he makes the chastity of his wife the one indispensable condition of their joint companionship. She, on her part, more easily chaste than himself, views with pain whatever embraces he bestows upon others of her sex. Her personal influence over him, always strong, enlarges its scope as the state advances in arts and refinement, until at length woman, as the maiden, the wife, and the matron, becomes intellectually cultivated, a recognized social power in the community. Yearning now for a wider influence and equal conditions, her attention, strongly concentrated upon the marriage relation, seeks to make the marriage terms equal: first, she desires her property secured to her own use, whether married or single, and, indignant at the inadequate remedies afforded under the law for wifely wrongs, demands the right of dismissing an unworthy husband at pleasure; moreover, as a mother, she claims that the children shall be hers not less than the father's. These first inroads are easily made; for what she demands is theoretically just. But just at this point the peril of female influence is developed. Woman rarely comprehends the violence of man's unbridled appetite, or perceives clearly that, after all, in the moral purity and sweetness of her own sex, such as excites man's devotion, and makes home attractive, is the fundamental safeguard of life and her own most powerful lever in society, besides the surest means of keeping men themselves continent. She forgets, too, that, to protect that purity and maintain her moral elevation, a certain seclusion is needful; which seclusion is highly favorable to those domestic duties which nature assigns her as her own. More is granted woman. The bond of marriage being loosened, posterity degenerates, society goes headlong, and the flood-gates of licentiousness once fully opened, the hand must be strong that can close them again.

Happiness, we may admit, differs with the capacity, like the great and small glass equally full, which Dr. Johnson mentions. Yet marriage is suited to all capacities; and men and women are the complement of one another in all ages, neither being greatly the intellectual superior of the other at any epoch, but the man always having necessarily the advantage in physical strength and the power to rule. The best

ordered marriage union for any community is that in which each sex accepts its natural place, where woman is neither the slave nor the rival of man, but his intelligent helpmate; where a sound progeny is brought up under healthful home influences. The worst is that where conjugal and parental affection fails, and all is discord and unrest, a sea without a safe harbor. To the household, stability may prove more essential than freedom, and woman's status more dignified or more degraded, as the case may be, than the law assumes to fix it.

In fine, society and the church should, while elevating woman, reconcile her to those functions, life-giving, life-preserving, educational and refining, to which nature consecrates her being. Marriage should be held the universal state of honor, a state of security, a state economical for all men as compared with pampered celibacy. Both sexes should be encouraged in constancy, affection; and interdependence. The policy of every government should be to encourage and strengthen matrimony, before public sentiment shifts in the direction of requiring concubinage to be legalized in its stead. Such is the force of the sexual passion, we may feel assured that, when marriage has ceased to attract mankind, the mistress has usurped the place of the wife; even prostitution may become the secret protest of mankind against a prostituted marriage.

§ 9. "**Husband and Wife**"; **Scope of the Present Treatise.** — Viewing, therefore, our subject without especial regard for any transient legislation framed in the interest of either partner, we designate it by the good old Anglo-Saxon name of "husband and wife;" for there are no rights and disabilities of a married woman, properly speaking, disconnected with the rights and disabilities of her spouse, but these rights and disabilities attach, rightly or wrongly, to the relation. In the full course of investigation we shall consider the law of marriage, the law which pertains to the marriage relation, and the law of marriage dissolution by death or divorce, together with the consequences of such dissolution.

§ 10. "**Marriage and Divorce**" as a **Separate Topic.** — Yet even here it should be observed by the professional reader, that

the term "husband and wife" is acquiring at law a more limited and technical sense than formerly. The idea of marriage involves both the entrance to the relation and the relation itself; and akin to marriage celebration is the dissolution of marriage by divorce, or what we may term our recognized legal exit to the relation. Hence marriage and divorce constitute an important topic by themselves; and we find treatises which profess to deal with these alone. Marriage and divorce, moreover, have, in England, pertained until quite recently to the peculiar jurisdiction of ecclesiastical courts, constituting what is termed an ecclesiastical law.¹ The rights and duties which grow out of the marriage relation, on the other hand, still remain for separate discussion; the consequence of the celebration; the effect of marriage upon the property of each; the personal status of the parties; in short, what new legal responsibilities are assumed and what legal privileges are gained by the two persons who have once voluntarily united as husband and wife. It is to this latter subdivision rather than the former that the title of husband and wife seems generally at the present day to apply. Reeve devotes but a brief chapter to marriage and divorce. Kent separates the subdivisions completely, applying the title husband and wife as above. Yet Blackstone, writing before either, had devoted two thirds of his lecture on husband and wife to the treatment of marriage and divorce alone, and very briefly disposed of the rights and disabilities of the marriage union under the same general heading. The many and rapid changes to which the entire law of husband and wife has been latterly subjected; the growth of divorce legislation on the one hand, and of property legislation for married women on the other, furnishes practical grounds for a subdivision so important. We shall subordinate, then, the topic of marriage and divorce to that of the marriage status, not, however, to the full extent of modern legal usage; at the same time noting that if some special term could be coined to distinguish the subdivision husband and wife from that general division which bears the same name, legal analysis would be more exact.

¹ Burn Eccl. Law; Bishop Mar. & Div. 5th ed. §§ 48-65. This subject is incidentally discussed, *post*.

§ 10 a. **Classification and Order of Topics.**— Our main topics in natural order are these: I. MARRIAGE AND PROMISES TO MARRY. II. THE PERSON OF THE SPOUSE; GENERAL RIGHTS AND DISABILITIES OF THE MARRIAGE RELATION. III. COMMON-LAW DOCTRINE OF COVERTURE AS TO WIFE'S CONTRACTS, TORTS, AND PROPERTY. IV. COVERTURE DOCTRINE MODIFIED BY EQUITY AND MODERN LEGISLATION. V. COMMUNITY DOCTRINE. VI. SETTLEMENTS, ANTENUPTIAL AND POSTNUPTIAL, AND TRANSACTIONS BETWEEN HUSBAND AND WIFE. VII. DISSOLUTION OF THE MARRIAGE RELATION BY DEATH. VIII. SEPARATION AND DISSOLUTION BY DIVORCE. IX. CONFLICT OF LAWS AFFECTING HUSBAND AND WIFE. These topics, which are arranged in order convenient for an analytical study of our present subject, admit of various subdivisions by chapters which will duly appear.

PART II.

MARRIAGE AND PROMISES TO MARRY.

CHAPTER I.

MARRIAGE.

§ 11. **Definition of Marriage.** — The word “marriage” signifies, in the first instance, that act by which a man and woman unite for life, with the intent to discharge towards society and one another those duties which result from the relation of husband and wife. The act of union having been once accomplished, the word comes afterwards to denote the relation itself.

§ 12. **Marriage more than a Civil Contract.** — It has been frequently said in the courts of this country that marriage is nothing more than a civil contract. That it is a contract is doubtless true to a certain extent, since the law always presumes two parties of competent understanding who enter into a mutual agreement, which becomes executed, as it were, by the act of marriage. But this agreement differs essentially from all others. This contract of the parties is simply to enter into a certain status or relation. The rights and obligations of that status are fixed by society in accordance with principles of natural law, and are beyond and above the parties themselves. They may make settlements and regulate the property rights of each other ; but they cannot modify the terms upon which they are to live together, nor superadd to the relation a single condition. Being once bound they are bound for ever. Mutual consent, as in all contracts, brings them together ; but mutual consent cannot

part them. Death alone dissolves the tie, — unless the legislature, in the exercise of a rightful authority, interposes by general or special ordinance to pronounce a solemn divorce; and this it should do only when the grossly immoral conduct of one contracting party brings unmerited shame upon the other, disgraces an innocent offspring, and inflicts a wound upon the community. So in other respects the law of marriage differs from that of ordinary contracts. For, as concerns the parties themselves, mental capacity is not the only test of fitness, but physical capacity likewise, — a new element for consideration, no less important than the other. Again, the encumbrance of an existing union operates here as a special disqualification. Blood relationship is another. So too an infant's capacity is treated on peculiar principles, as far as the marriage contract is concerned, for he can marry young and be bound by his marriage. Third parties cannot attack a marriage because of its injury to their own interests. International law relaxes its usual requirements in favor of marriage. And finally the formal celebration now prevalent, both in England and America, is something peculiar to the marriage contract; and in its performance we see but the faintest analogy to the execution and delivery of a sealed instrument.

The earnestness with which so many of our American progenitors insisted upon the contract view of marriage may be ascribed in part to their hatred of the Papacy and ritualism, and their determination to escape the conclusion that marriage was a sacrament. By no people have the marriage vows been more sacredly performed than by ours down to a period, at all events, comparatively recent. That a State legislature is not precluded from regulating the marriage institution under any constitutional interdiction of acts impairing the obligation of contracts, or interfering with private rights and immunities, has frequently been asserted.¹ And as to the private regulation of their property rights, by the contract of parties to a marriage, that, of course, is to be distinguished

¹ *Maguire v. Maguire*, 7 Dana, 181; *tenheimer*, 6 Oreg. 281; *Adams v. Green v. State*, 58 Ala. 190; *Fraser Palmer*, 51 Me. 480.
v. State, 8 Tex. App. 263; *Rugh v. Ot-*

from their marriage, which may take place without any property regulation whatever.¹

We are then to consider marriage not as a contract in the ordinary acceptation of the term; but as a contract *sui generis*, if, indeed, it be a contract at all; as an agreement to enter into a solemn relation which imposes its own terms. On the one hand discarding the unwarranted dogmas of the church of Rome, by which marriage is elevated to the character of a sacrament, on the other we repudiate that dry definition with which the lawgiver or jurist sometimes seeks to impose upon the natural instincts of mankind. We adopt such views as the distinguished Lord Robertson held.² And Judge Story observes of marriage: "It appears to me something more than a mere contract. It is rather to be deemed an institution of society founded upon the consent and contract of the parties; and in this view it has some peculiarities in its nature, character, operation, and extent of obligation, different from what belongs to ordinary contracts."³ So Fraser, while defining marriage as a contract, adds in forcible language: "Unlike other contracts, it is one instituted by God himself, and has its foundation in the law of nature. It is the parent, not the child, of civil society."⁴ And we may add that a recent American text-writer, of high repute upon the subject, not only pronounces for this doctrine, after a careful examination of all the authorities, but ascribes the chief embarrassment of American tribunals, in questions arising under the conflict of marriage and divorce laws, to the custom of applying the rules of ordinary contracts to the marriage relation.⁵

§ 13. *Marriages void and voidable.* — A distinction is made at law between void and voidable marriages. This distinction, which appears to have originated in a conflict between the English ecclesiastical and common-law courts, was first

¹ Lord Stowell, in *Lindo v. Belisario*, 1 Hag. Con. 216; 1 Bish. Mar. & Div. 5th ed. § 14.

² *Duntze v. Levett*, Ferg. 68, 385, 397; 8 Eng. Ec. 360, 495, 502.

³ Story Conf. Laws, § 108 n.

⁴ 1 Fras. Dom. Rel. 87.

⁵ 1 Bish. Mar. & Div. 5th ed. § 18. And see *Dickson v. Dickson*, 1 Yerg. 110, per Catron, J.; *Ditson v. Ditson*, 4 R. I. 87, per Ames, C. J.

announced in a statute passed during the reign of Henry VIII. ; and it is also to be found in succeeding marriage and divorce acts down to the present day. The distinction of void and voidable applies not to the legal consequences of an imperfect marriage, once formally dissolved, but to the status of the parties and their offspring before such dissolution. A void marriage is a mere nullity, and its validity may be impeached in any court, whether the question arise directly or collaterally, and whether the parties be living or dead. But a voidable marriage is valid for all civil purposes until a competent tribunal has pronounced the sentence of nullity, upon direct proceedings instituted for the purpose of setting the marriage aside. When once set aside, the marriage is treated as void *ab initio*; but unless the suit for nullity reaches its conclusion during the lifetime of both parties, all proceedings fall to the ground, and both survivor and offspring stand as well as though the union had been lawful from its inception.¹ Hence we see that, while a void marriage makes cohabitation at all times unlawful and bastardizes the issue, a voidable marriage protects intercourse between the parties for the time being, furnishes the usual incidents of survivorship, such as curtesy and dower, and encourages the propagation of children. But the moment the sentence of nullity is pronounced, the shield of the law falls, the incidents vanish, and innocent offspring are exposed to the world as bastards ; and herein is the greatest hardship of a voidable marriage.

The old rule is that civil disabilities, such as idiocy and fraud, render a marriage void ; while the canonical impediments, such as consanguinity and impotence, make it voidable only. This test was never a clear one, and it has become of little practical consequence at the present day. Statutes both in England and America have greatly modified the ancient law of valid marriages, and it can only be affirmed in general terms that the legislative tendency is to make marriages voidable rather than void, wherever the impediment is such as might not have been readily known to both parties before marriage ; and where public policy does not rise supe-

¹ 1 St. 32 Hen. VIII. c. 38. See 1 Bish. Mar. & Div. 5th ed. § 108 *et seq.*

rior to all considerations of private utility. Modern civilization strongly condemns the harsh doctrine of *ab initio* sentences of nullity; and such sentences have now in general a prospective force only, in order that rights already vested may remain unimpaired, and, still more, that children may not suffer for the follies of their parents.¹

§ 14. *Essentials of Marriage.*—We shall consider in this chapter that act by which parties unite in matrimony,—for to this the term “marriage” is most frequently applied. It may be stated generally that, in order to constitute a perfect union, the contracting parties should be two persons of the opposite sexes, without disqualification of blood or condition, both mentally competent and physically fit to discharge the duties of the relation, neither of them being bound by a previous nuptial tie, neither of them withholding a free assent; and the expression of their mutual assent should be substantially in accordance with the prescribed forms of law. These are the essentials of marriage. Hence we are to treat of the following topics in connection with the essentials of a valid marriage: *first*, the disqualification of blood; *second*, the disqualification of civil condition; *third*, mental capacity; *fourth*, physical capacity; *fifth*, the disqualification of infancy, which in reality is based upon united considerations of mental and physical unfitness; *sixth*, prior marriage undissolved; *seventh*, force, fraud, and error; *eighth*, the formal celebration of a marriage, under which last head may be also included the consent of parents or guardians, not to be deemed an essential, except in conformity with the requirements of the marriage celebration acts. These essentials all have reference solely to the time, place, and circumstances of entering into the marriage relation, and not to any subsequent incapacity of either party.

¹ Shelf. Mar. & Div. 154; *Id.* 479—*v. Bowers*, 10 Rich. Eq. 551; *Pingree v. Goodrich*, 41 Vt. 47; *Divorce, post.* 484; 1 Bl. Com. 484; 1 Bish. Mar. & Div. 5th ed. §§ 105–120. See Stat. 5 Held *contra* as to the marriage of a negro and white person. *Carter v. Montgomery*, 2 Tenn. Ch. 216. And see *post* & 6 Will. IV. c. 54; 2 N. Y. Rev. Sta. 139, § 6; Mass. Gen. Sta. c. 106, § 4; *Harrison v. State*, 22 Md. 468; *Bowers* as to impotence or physical incapacity.

§ 15. **Disqualification of Blood; Consanguinity and Affinity.**—And, *first*, as to the disqualification of blood. On no point have writers of all ages and countries been more united than in the conviction that nature abhors, as vile and unclean, all sexual intercourse between persons of near relationship. But on few subjects have they differed more widely as in the application of this conviction. Among Eastern nations, since the days of the patriarchs, practices have prevailed which to Christian nations and in days of civilized refinement, seem shocking and strange. The difficulty then is, not in discovering that there is some prohibition by God's law, but in ascertaining how far that prohibition extends. This difficulty is manifested in our language by the use of two terms,—consanguinity and affinity; one of which covers the *terra firma* of incestuous marriages, the other offers debatable ground. The disqualification of consanguinity applies to marriages between blood relations in the lineal or ascending and descending lines. There can be but one opinion concerning the union of relations as near as brother and sister. The limit of prohibition among remote collateral kindred has, however, been differently assigned in different countries. The English canonical rule is that of the Jewish law. The Greeks and Romans recognized like principles, though with various modifications and alterations of opinion. But the church of the Middle Ages found in the institution of marriage, once placed among the sacraments, a most powerful lever of social influence. The English ecclesiastical courts made use of this disqualification, extending it to the seventh degree of canonical reckoning in some cases, and beyond all reasonable bounds.¹ So intolerable became this oppression, that a statute passed in the time of Henry VIII. forbade these courts thenceforth to draw in question marriages without the Levitical degree, "not prohibited by God's law."² Under this statute, which is still essentially in force in Eng-

¹ In some Roman Catholic countries,—*e. g.* Portugal,—the marriage of first cousins is still pronounced incestuous. See *Sottomayor v. De Barros*, L. R. 2 P. D. 81; L. R. 3 P. D. 1.

² Stat. 32 Hen. VIII. c. 38. See Bish. Mar. & Div. 5th ed. §§ 106, 107; 2 Kent Com. 82, 83; Shelf. Mar. & Div. 163 *et seq.*; Wing v. Taylor, 2 Swab. & T. 278, 295.

land, the impediment has been treated as applicable to the whole ascending and descending line, and further, as extending to the third degree of the civil reckoning inclusive; or in other words, so as to prohibit all marriages nearer than first cousins. Archbishop Parker's table of degrees, which recognizes these limits, has been, since 1563, the standard adopted in the English ecclesiastical courts.¹ The statute prohibition includes legitimate as well as illegitimate children, and half-blood kindred equally with those of the whole blood.² Its principles have been recognized in the United States.³

But the English law goes even further, and places affinity on the same footing as consanguinity as an impediment. Affinity is the relationship which arises from marriage between a husband and his wife's kindred, and *vice versa*. It is shown that while the marriage of persons allied by blood produces offspring feeble in body and tending to insanity, that of persons connected by affinity leads to no such result; and further, that consanguinity has been everywhere recognized as an impediment, but not affinity. The worst that can probably be said of the latter is, that it leads to confusion of domestic rights and duties. No question has been discussed with more earnestness in both England and America, with less positive result, than one which turns upon this very

¹ 1 Bish. Mar. & Div. 5th ed. § 318; *Butler v. Gastrill*, Gilb. Ch. 156.

According to this table, —

A man may not marry his

1. Grandmother.
2. Grandfather's wife.
3. Wife's grandmother.
4. Father's sister.
5. Mother's sister.
6. Father's brother's wife.
7. Mother's brother's wife.
8. Wife's father's sister.
9. Wife's mother's sister.
10. Mother.
11. Step-mother.
12. Wife's mother.
13. Daughter.
14. Wife's daughter.

A woman may not marry her

1. Grandfather.
2. Grandmother's husband.
3. Husband's grandfather.
4. Father's brother.
5. Mother's brother.
6. Father's sister's husband.
7. Mother's sister's husband.
8. Husband's father's brother.
9. Husband's mother's brother.
10. Father.
11. Step-father.
12. Husband's father.
13. Son.
14. Husband's son.

² 1 Bish. Mar. & Div. 5th ed. §§ 315, 317; *Reg. v. Brighton*, 1 B. & S. 447. niece has been treated as incestuous. *Harrison v. State*, 22 Md. 468; *Bowers v. Bowers*, 10 Rich. Eq. 551.

³ Marriage between an uncle and

distinction; namely, whether a man may marry his deceased wife's sister. This question has received a favorable response in Vermont.¹ But in England such marriages are still deemed incestuous, and within the prohibition of God's law, and the House of Lords resists all legislative change in this respect.²

Marriages within the forbidden degrees of consanguinity were formerly only voidable in English law; but by modern statutes they have been made null and void. In this country they are generally pronounced void by statute (that is to say, void from the time the sentence is pronounced³), and the offending parties are liable to imprisonment. But with regard to marriages among relatives by affinity, the rule is not so stringent as in England.⁴

§ 16. *Disqualification of Civil Condition; Race, Color, Social Rank*. — *Second*, as to the disqualification of civil condition. Race, color, and social rank do not appear to constitute an impediment to marriage at the common law, nor is any such impediment now recognized in England.⁵ But by local statutes in some of the United States, intermarriage has long been discouraged between persons of the negro, Indian, and white races.⁶ With the recent extinction of slavery, many of

¹ *Blodget v. Brinsmaid*, 9 Vt. 27; and see 1 Bish. Mar. & Div. 5th ed. § 814; *Paddock v. Wells*, 2 Barb. Ch. 881. Collamer, J., in *Blodget v. Brinsmaid*, makes this ingenious distinction: "The relationship by consanguinity is, in its nature, incapable of dissolution; but the relationship by affinity ceases with the dissolution of the marriage which produced it. Therefore, though a man is, by affinity, brother to his wife's sister, yet, upon the death of his wife, he may lawfully marry her sister."

² *Hill v. Good*, Vaugh. 302; *Harris v. Hicks*, 2 Salk. 648; *Spelf. Mar. & Div.* pp. 172, 178; 2 Kent Com. 84, note, and authorities cited; *Reg. v. Chadwick*, 12 Jur. 174; 11 Q. B. 178; *Pawson v. Brown*, 41 L. T. N. S. 339; *Ex parte Naden*, L. R. 9 Ch. 670. And see *Commonwealth v. Perryman*, 2 Leigh, 717, as to the Virginia statute on this point.

³ That is to say, not void *ab initio*.

See *supra*, § 13; *Harrison v. State*, 22 Md. 468. And see *Bowers v. Bowers*, 10 Rich. Eq. 551; *Parker's Appeal*, 8 Wright, 809, where an incestuous marriage is treated as simply voidable.

⁴ 2 Kent Com. 83, 84, and notes; 1 Bish. Mar. & Div. 5th ed. §§ 312-320; *Regina v. Chadwick*, 12 Jur. 174; *Sutton v. Warren*, 10 Met. 451; *Bonham v. Badgley*, 2 Gilm. 622; *Wightman v. Wightman*, 4 Johns. Ch. 343; *Butler v. Gastrill*, Gilb. Ch. 156; *Burgess v. Burgess*, 1 Hag. Con. 384; *Blackmore v. Brider*, 2 Phillim. 359.

⁵ 1 Bish. Mar. & Div. 5th ed. §§ 308-311; 1 Burge Col. & For. Laws, 138.

⁶ See *Bailey v. Fiske*, 84 Me. 77; *State v. Hooper*, 5 Ire. 201; *State v. Brady*, 9 Humph. 74; *Barkshire v. State*, 7 Ind. 889; 1 Bish. Mar. & Div. 5th ed. §§ 154-163. One drop less than one fourth negro blood saves from the taint in Virginia. *McPherson v. Commonwealth*, 28 Gratt. 989.

these laws have passed into oblivion, together with such as refused to allow to persons held in bondage, and negroes generally, the rights of husband and wife. The thirteenth article of amendment to the Constitution gives Congress power to enforce the abolition of slavery "by appropriate legislation." As to persons formerly slaves, there are now acts of Congress which legitimate their past cohabitation, and enable them to drop the fetters of concubinage. And the manifest tendency of the day is towards removing all legal impediments of rank and condition, leaving individual tastes and social manners to impose the only restrictions of this nature.¹

Accordingly we now find in most Southern States, where slavery existed until abolished by supreme authority of the United States, statutes which expressly legalize the marriages of former slaves and persons of the colored race who continued to cohabit as husband and wife after such emancipation, and which legitimate their previous offspring.² But subsequent emancipation would not be thought to resuscitate a slave marriage or cohabitation previously dissolved;³ nor would what slaves understood to be their merely illicit companionship come within the purview of such statutes.⁴ And Southern policy, furthermore, still treats the amalgamation of races with great disfavor; not only prohibiting marriage between whites and negroes, as before the downfall of slavery, but in some States punishing the offending parties as criminals;⁵ though apparently regarding the colored mistresses of white men more leniently.⁶

¹ Act July 25, 1866, c. 240; Act June 6, 1866, c. 106, § 14. And see 15th Amendment U. S. Const.; *Stewart v. Munchandler*, 2 Bush (Ky.), 278; *State v. Harris*, 63 N. C. 1.

² *Scoggins v. State*, 32 Ark. 205; *Jones v. Jones*, 45 Md. 144; *Hayden v. Ivey*, 51 Ala. 881; *Brown v. McGee*, 12 Bush, 428; *McConico v. State*, 49 Ala. 6; *Jackson v. State*, 58 Ala. 472. Such acts may apply to persons born free. *Francis v. Francis*, 31 Gratt. 283.

³ See *Pierre v. Fontenette*, 25 La. Ann. 617.

⁴ *Floyd v. Calvert*, 58 Miss. 87.

⁵ And this is held not to contravene the Constitution of the United States or civil rights legislation by Congress. See *State v. Gibson*, 36 Ind. 389; *State v. Hairston*, 63 N. C. 451; *State v. Kennedy*, 76 N. C. 251; *Green v. State*, 58 Ala. 190; *Scott v. State*, 39 Ga. 321; *Fraser v. State*, 8 Tex. App. 263; *State v. Bell*, 7 Baxter, 9; *Carter v. Montgomery*, 2 Tenn. Ch. 216; *Kinney v. Commonwealth*, 30 Gratt. 858. Cf. *Honey v. Clark*, 37 Tex. 686. Under the *lex loci* such marriages are sometimes upheld when contracted elsewhere. See *Conflict of Laws*, *post*.

⁶ *Moore v. State*, 7 Tex. App. 608.

§ 17. **Religious Disqualification.**—To the same head we may, perhaps, refer another disqualification which existed in Great Britain at a period when differences of religious belief were made the foundation of civil disabilities. In a few recent American cases, statutes of the eighteenth century were set up to show that, abroad, marriage between a Roman Catholic and Protestant was forbidden; but the suggestion received little encouragement, and clear proof to the point was not actually furnished.¹

§ 18. **Mental Capacity of Parties to a Marriage.**—*Third*, as to mental capacity. No one can contract a valid marriage unless capable at the time of giving an intelligent consent. Hence the marriages of idiots, lunatics, and all others who have not the use of their understanding, are now treated as null; though the rule was formerly otherwise, from, perhaps, too great regard to the sanctity of the institution in the English ecclesiastical courts.² What degree of insanity will amount to disqualification is not easily determined; so varied are the manifestations of mental disorder at the present day, and so gradually does mere feebleness of intellect shade off into hopeless idiocy. Certain it is that a person may enter into a valid marriage, notwithstanding he has a mental delusion on certain subjects, is eccentric in his habits, or is possessed of a morbid temperament, provided he displays soundness in other respects and can manage his own affairs with ordinary prudence and skill.³ Every case stands on its own merits; but the usual test applied in the courts is that of fitness for the general transactions of life; for, it is argued, if a man is incapable of entering into other contracts, neither can he contract marriage.⁴ This test is sufficiently precise for most pur-

¹ *Commonwealth v. Kenney*, 120 Mass. 387; *Philadelphia v. Williamson*, 10 Phila. 176. The statute 19 Geo. II. ch. 13, to this effect, has partial reference to the solemnization of marriage by a Popish priest. These are disabilities imposed by a Protestant parliament, it is worth observing.

² See Lord Stowell in *Turner v. Meyers*, 1 Hag. Con. 414; 1 Bish. Mar. & Div. 5th ed. § 125.

³ 2 Kent Com. 76; *Browning v. Reane*, 2 Phillim. 69; 1 Bish. Mar. & Div. 5th ed. §§ 124-142; *Turner v. Meyers*, 1 Hag. Con. 414; 4 Eng. Ec. 440; 1 Bl. Com. 438, 439.

⁴ *Mudway v. Croft*, 3 Curt. Ec. 671; *Anon.*, 4 Pick. 32; *Cole v. Cole*, 5 Sneed, 57; *Atkinson v. Medford*, 46 Me. 510; *Ward v. Dulaney*, 23 Miss. 410; *Elzey v. Elzey*, 1 Houst. 308; *McElroy's Case*, 6 W. & S. 451. See

poses. Yet we apprehend the real issue is whether the man is capable of entering understandingly into the relation of marriage; for natural impulses are so strong that a man may know well the contract he assumes by the act of marriage, while he is not equally fit to enter into other engagements. There are two questions, however: first, whether the party understands the marriage contract; second, whether he is fit to perform understandingly the momentous obligations which that contract imposes; and both elements might well enter into the consideration of each case. "If any contract more than another," observes Lord Penzance in a recent English case, "is capable of being invalidated on the ground of the insanity of either of the contracting parties, it should be the contract of marriage,—an act by which the parties bind their property and their persons for the rest of their lives."¹

§ 19. **Lucid Intervals; Temporary Insanity, &c.**—Marriage contracted during a lucid interval is at law deemed valid;² but the English statute provides that such marriages are void when a commission of lunacy has once been taken out and remains unrevoked.³ Similar provisions are to be found in some of our States. On the other hand, marriage contracted by a person habitually sane, during temporary insanity, is unquestionably void,⁴ as of course would be any marriage contracted by one at the time permanently insane. Strange behavior at, and shortly before and after, the nuptials, at the last stage of the engagement, at the wedding breakfast or reception, on the wedding journey, and so on, are quite material as part of the *res gestæ*, upon the general issue of marriage disqualification at the time of the ceremony. Where, as so often happens, the malady develops soon after, the question is, whether the mind of the contracting party was diseased or not at the time of the contract or ceremony so far as to render that party unfit to contract the marriage. If, as Lord Penzance has ruled, the evidence establishes that it was

¹ Bish. Mar. & Div. § 128; *Ex parte* 63 N. Y. 409; *Parker v. Parker*, 6 Eng. Ec. 165; *Smith v. Smith*, 47 Miss. 211.

² *Hancock v. Peaty*, L. R. 1 P. & D. 335, 341.

³ Shelf. Mar. & Div. 197; 1 Bish. Mar. & Div. § 180; *Banker v. Banker*,

⁴ Stat. 15 Geo. II. c. 30, 1742; not part of the common law in this country.

⁴ *Legeyt v. O'Brien*, Milward, 825; *Parker v. Parker*, 6 Eng. Ec. 165.

so diseased, the extent of the derangement is immaterial.¹ And yet so important is it to make the time of consummating this contract the focus of inquiry, that a marriage has been lately upheld, notwithstanding the husband was, two days after the wedding, adjudged insane under an inquisition of lunacy pending, as his wife knew, at the time of the marriage.² Insanity, occurring subsequently to the marriage, is no cause for annulling the marriage, nor, in general, for procuring a divorce;³ neither would mere evidence of hereditary taint in the defendant's family suffice for dissolving the conjugal relation.⁴

§ 20. Drunkenness; Deaf and Dumb Persons, &c. — Upon the principle of temporary insanity, drunkenness incapacitates, if carried to the excess of *delirium tremens*; though not, it would appear, if the party intoxicated retains sufficient reason to know what he is doing.⁵ Drunkenness was formerly held a bad plea; for the common law permitted no one to stultify himself; but the modern rule is more reasonable. Some cases require that fraud or unfair advantage should be shown; yet the better opinion is that even this is unnecessary.⁶ Deaf and dumb persons were formerly classed as idiots; this notion, however, is exploded. They may now contract marriage by signs.⁷ Total blindness, or mere deafness, of course constitutes no incapacity. In general, we may

¹ *Hancock v. Peaty*, L. R. 1 P. & D. 335.

² *Banker v. Banker*, 68 N. Y. 409. This inquisition declared that the husband had been of unsound mind six months previous to the marriage. But the court of appeals held that such inquisition is only presumptive evidence of incapacity prior to the finding, and rested upon evidence adduced in the action to annul the marriage, which was sufficient to overcome that presumption.

³ See *McAdam v. Walker*, 1 Dow, 148; 1 Bish. Mar. & Div. § 130; *Divorce, post*; *Smith v. Smith*, 47 Miss. 211.

⁴ *Smith v. Smith*, 47 Miss. 211. Cf. *Waymire v. Jetmore*, 22 Ohio St. 271,

— a case of congenital imbecility of mind.

⁵ *Clement v. Mattison*, 3 Rich. 93; 1 Bish. Mar. & Div. 5th ed. § 131; *Gore v. Gibson*, 13 M. & W. 623; 2 Kent Com. 451, and authorities cited; *Lord Ellenborough*, in *Pitt v. Smith*, 3 Camp. 33; *Scott v. Paquet*, L. R. 1 P. C. 552.

⁶ See 1 Bish. Mar. & Div. 5th ed. §§ 131, 132, and conflicting cases cited. And see recent Delaware case of *Elzey v. Elzey*, 1 Houst. 808, under a statute which makes "insanity" a ground of divorce. *Stewart v. Robertson*, 2 H. L. Sc. 494.

⁷ 1 Bish. Mar. & Div. 5th ed. § 133, and cases cited; 1 Fras. Dom. Rel. 48; *Dickenson v. Blisset*, 1 Dickens, 268; *Harrod v. Harrod*, 1 Kay & Johns. 4.

add, that the disqualification of insanity is often considered in connection with fraud or undue influence exercised by or on behalf of the other contracting party, over a weak intellect, for the sake of a fortune, a title, or some other worldly advantage.¹

§ 21. *Marriages, how annulled for Insanity; Marriage Confirmed.*—Suits of nullity, brought to ascertain the facts of insanity, are favored by law both in England and America; and modern legislation discountenances all collateral disputes involving questions so painful and perplexing. "Though marriage with an idiot or lunatic be absolutely void, and no sentence of avoidance be absolutely necessary," says Chancellor Kent, "yet, as well for the sake of the good order of society, as for the peace of mind of all persons concerned, it is expedient that the nullity of the marriage should be ascertained and declared by the decree of a court of competent jurisdiction."² In many States this is now the only course to be pursued, such marriages being treated as voidable and not void; and the insane spouse dying before proceedings to dissolve the marriage are begun, the survivor takes all the benefits of a valid marriage accordingly.³ Such suits of nullity may be brought by a guardian on behalf of the insane spouse, or by the sane spouse who married in good faith, ignorant that the disability existed.⁴ Upon reasons of justice and policy, and in conformity with the analogy of fraud, force, and error, to be hereafter noticed, we may presume that one who marries while insane may, by cohabitation and other suitable acts, confirm the marriage, if afterwards restored to reason, so as to dispense with further ceremonies,⁵ and that by similar behavior, after knowledge of the disability, the same spouse may become debarred from setting up such insanity on his own behalf. In general, when a couple have

¹ Fraud as an element of disqualification will be considered *post*.

² 2 Kent Com. 76.

³ 1 Bish. Mar. & Div. 5th ed. §§ 136-142; *Goshen v. Richmond*, 4 Allen, 458; *Hamaker v. Hamaker*, 18 Ill. 187; *Williamson v. Williams*, 3 Jones Eq. 446; *Wiser v. Lockwood*, 42 Vt. 720;

Brown v. Westbrook, 27 Ga. 102; *Stuckey v. Mathes*, 31 N. Y. Supr. 461.

⁴ *Hancock v. Peaty*, L. R. 1 P. & D. 335; *Banker v. Banker*, 63 N. Y. 409; *Crump v. Morgan*, 3 Ire. Eq. 91.

⁵ *Cole v. Cole*, 5 Sneed, 57; 1 Bish. Mar. & Div. §§ 139-142.

lived together as man and wife during their joint lives, it is too late to impugn the marriage afterwards on the ground that the deceased spouse was insane at the time of the nuptials.¹

§ 22. *Physical Capacity of Parties to a Marriage; Impotence, &c. — Fourth.* The question of physical capacity involves an investigation of facts even more painful and humiliating than that of mental capacity. Yet as marriage is instituted, in part at least, for the indulgence of natural cravings and with a view to propagate the human family, sound morality demands that the proper means shall not be wanting. Our law demands that, at all events, the sexual desire may be fully gratified. Where impotence exists, therefore, there can be no valid marriage. By this is meant simply that the sexual organization of both parties shall be complete. But mere barrenness or incapacity of conception constitutes no legal incapacity in England and the United States, nor can a physical defect which does not interfere with copulation; nor indeed any disability which is curable, even though not actually cured, unless the party disabled unreasonably refuses to submit to the proper remedies.² Such refusal, however, puts the disabled spouse clearly in the wrong; and where, in a late English case, a wife fell into hysterics whenever her husband attempted to have connection with her, and for three years refused to submit to medical inspection, the union was dissolved upon his petition.³ The refusal of carnal intercourse by a healthy spouse is quite a different matter, and gives rise to other inquiries under the head of divorce;⁴ while at the same time refusal beyond a reasonable time after marriage may afford a presumption of incapacity, and entitle the offended party to a decree accordingly.⁵ Nor certainly can physical incapacity arising from some cause subsequent to

¹ *Sabalot v. Populus*, 31 La. Ann. 854. St. Tr. 786; *Briggs v. Morgan*, 3 Philim. 825. For a case where the disability was possibly curable, see *G. v. G.*, L. R. 2 P. & D. 287.

² 1 Bish. Mar. & Div. §§ 821-840, and cases cited; 1 Fras. Dom. Rel. 53; *B. v. B.*, 28 E. L. & Eq. 95; 1 Bl. Com. 440, n. by Chitty and others; Ayl. Parer. 227; *Devanbagh v. Devanbagh*, 5 Paige, 554; *Essex v. Essex*, 2 Howell

³ *H. v. P.*, L. R. 3 P. & D. 126.

⁴ See *Divorce, post*; *Cowles v. Cowles*, 112 Mass. 298.

⁵ *S. v. A.*, 3 P. D. 72.

marriage be referred to the present subject; the question being as to incapacity at the date of marriage.¹

The reader will find Dr. Lushington's opinion in the leading case of *Deane v. Aveling*² sufficiently suggestive as to the extent of malformation which invalidates a marriage on the ground of physical incapacity. It will be observed that this case establishes a principle which later cases do not undermine, namely, that it is capacity for fulfilling the conditions of copulation, and not of procreation, that our own law regards. To those who marry past the age of child-bearing, nullity on good grounds of impotence has not been refused.³ Declining opportunity to be cured, as we have above suggested, may render one's physical defect practically incurable for the purposes of judicial sentence; and, moreover, sexual connection not physically impossible, and yet possible only under conditions to which the healthy spouse ought not to resort, may justify a decree in that spouse's favor.⁴ We may add that, with the rapid progress of medical science during the present century, cases of absolute and incurable impotence are happily diminishing in number.⁵

§ 23. **Judicial Sentence; Nullity.**—The necessity of judicial sentence, before a marriage can be considered null for impotence or physical incapacity, is too obvious for argument.⁶ But the decree has gone so far, in instances not remote of this kind, as to render the marriage void *ab initio*;⁷ there being at all events no posterity to be injuriously affected by so sweeping a sentence, nor much love lost between the conjugal pair whose union comes to so humiliating an end. Jurisdiction is exercised to declare the marriage originally

¹ See *Morrell v. Morrell*, 24 N. Y. Supr. 324.

² 1 Robertson, 279, 298. And see recent case of *U. v. J.*, L. R. 1 P. & D. 480.

³ *W. v. H.*, 2 Swab. & T. 240.

⁴ Lord Penzance, in *G. v. G.*, L. R. 2 P. & D. 287; the difficulty being on the part of the female. Impotence on the part of the male from previous habits of self-indulgence might present cor-

responding considerations. See 1 Bish. §§ 331-338.

⁵ See recent cases: *T. v. M.*, L. R. 1 P. & D. 31; *T. v. D.*, L. R. 1 P. & D. 127; *Carll v. Prince*, L. R. 1 Ex. 246. But with modern facilities, including the right of parties to testify in their own suits, these cases appear to be on the increase in Great Britain. 1 Bish. § 331.

⁶ *A. v. B.*, L. R. 1 P. & D. 559.

⁷ See 1 Bish. Mar. & Div. § 339.

void. Under recent statutes, however, the proceedings in England and some parts of the United States often appear to assume the character of a bill of divorce.¹ Suits for impotence ought to be brought within a reasonable time after marriage, as otherwise a waiver of the disqualification may be presumed.²

It is held in some of the United States that, in the absence of any express statutory provision therefor, a marriage will not be annulled for impotence.³

§ 24. *Disqualification of Infancy.* — *Fifth.* Infancy may be an impediment to marriage; but only so far, on principle, as the marrying party, by reason of imperfect mental and physical development, may be brought within the reason of the last two rules. Hence we find that infancy is not a bar to marriage to the same extent as in ordinary contracts; since minors cannot repudiate their choice of husband or wife on reaching majority. Not that marriage calls for less discrimination, for it carries with it consequences far beyond all other contracts, involving property rights of the gravest import; but because public policy must protect the marriage institution against the reckless imprudence of individuals. A certain period is established, called the age of consent, which in England is fixed at fourteen for males and twelve for females, a rule adopted from the Roman law, but which, in this country, varies all the way from fourteen to eighteen for males, and twelve to sixteen for females, according to local statutes; differences of climate and physical temperament contributing, doubtless, to make the rule of nature, in this respect, a fluctuating one.⁴ Marriages without the age of consent are as

¹ *H. v. P.*, 1 L. R. 8 P. & D. 126; *Tefft v. Tefft*, 35 Ind. 44; *G. v. G.*, 83 Md. 401; *Bascomb v. Bascomb*, 5 Foster, 267. The same may be affirmed of proceedings in case of insanity in certain States. *Divorce, post.*

² In *Peipho v. Peipho*, 88 Ill. 438, eight years was held too long a delay. In *W. v. R.*, 1 P. & D. 405, a suit for impotence was refused, where delayed twenty-five years and then brought as the result of a domestic quarrel. Some statutes, as, for instance, that of New

York, provide a barrier by special limitation; which limitation, *semble*, should be pleaded in defence. *Kaiser v. Kaiser*, 23 N. Y. Supr. 602.

³ Anonymous, 24 N. J. Eq. 19.

⁴ See 2 Kent Com. 79, notes, showing the periods fixed in different States as the age of consent. In the old States the common-law rule generally prevails. In Ohio, Indiana, and other Western States, the age of consent is raised to eighteen for males, and fourteen for females. See also *Bennett v.*

binding as those of adults; marriages within such age may be avoided by either party on reaching the period fixed by law. And even though one of the parties was of suitable age and the other too young, at the time of marriage, yet the former, it appears, may disaffirm as well as the latter.¹ Herein is observed a departure from that principle of law, that an infant may avoid his contract while the adult remains bound: it is a concession which the law makes in favor of mutuality in the marriage compacts. Marriages celebrated before both parties have reached the age of consent may be disaffirmed in season, either with or without a judicial sentence. When the age of consent is reached, no new ceremony is requisite to complete the marriage at the common law; but election to affirm will then be inferred from circumstances, such as continued intercourse, and even slight acts may suffice to show the intention of the parties. If they then choose to remain husband and wife, they are bound for ever. Disaffirmance, on the other hand, may be either with or without a judicial sentence.² Marriage within the age of consent seems therefore to be neither strictly void nor strictly voidable, but rather inchoate and imperfect;³ with, however, a reservation by the ecclesiastical law as to marriage with an infant below seven years, which is treated as altogether null.⁴

The marriage of an adult with a minor may involve considerations of fraud and undue influence. In a recent Illinois case, a bill was brought on behalf of an infant to annul a marriage and declare the contract void. It appeared that the complainant was, at the time of the marriage, a school girl, about fifteen years old;⁵ that the defendant, her father's

Smith, 21 Barb. 439, as to the power of the New York courts to annul marriages with persons under age.

¹ Co. Litt. 79, and Harg. n. 45; 1 East P. C. 468; 1 Bish. Mar. & Div. 5th ed. § 149. But it is not certain that a party of competent age may disaffirm equally with the party incompetent. *People v. Slack*, 15 Mich. 198.

² 1 Bish. Mar. & Div. § 150.

³ Co. Litt. 83 a; 2 Kent Com. 78, 79; 1 Bish. Mar. & Div. 5th ed. §§ 148-158, and cases cited; 1 Bl. Com. 486;

1 Fras. Dom. Rel. 42; *Parton v. Hervey*, 1 Gray, 119; *Fitzpatrick v. Fitzpatrick*, 6 Nev. 63. See *Shaffer v. State*, 20 Ohio, 1, *contra*, *Goodwin v. Thompson*, 2 Iowa, 329; *Aymar v. Roff*, 3 Johns. Ch. 49, as to the invalidity of such marriages, unless confirmed by cohabitation after reaching the statutory age. Local statutes affect this whole subject.

⁴ 2 Burn Ec. Law, 434; 1 Bish. Mar. & Div. § 147.

⁵ The context shows that the girl

coachman, while driving the children out, inveigled the complainant into the marriage; that he procured a marriage license through perjury, by swearing that the complainant was of age; and that she never consummated the marriage by cohabitation, but immediately repudiated it. The incongruity of such a match, the youth of the girl, the palpable abuse by a hired adult servant of the confidence reposed in him by the child's parents, and the minor's repudiation of the marriage before the nuptials had been consummated, were circumstances influential with the court. The case being a peculiar one, upon these facts rather than on principle, decree was entered, justly enough, declaring void the marriage.¹ Where, too, an infant under the age of assent, immediately after the ceremony with an adult, and before its consummation, has alleged ignorance and a dissent, a court of chancery has in New York interposed its protection and prohibited the adult from all intercourse and correspondence.²

§ 25. *Disqualification of Prior Marriage undissolved; Polygamy; Bigamy.* — *Sixth*, as to the impediment of prior marriage undissolved. It is a well established rule in civilized countries that marriage between parties, one of whom is bound by an existing marriage tie, is not only void, but subjects the offenders to criminal prosecution.³ Polygamy, or bigamy as it is often termed, — since the common law of England could scarcely conceive of such conjunctions carried beyond a double marriage, — is discarded by all Christian communities. It is tolerated, though not sanctioned, in certain territory of the United States. The fundamental doctrine of Christian marriage is that no length of separation can

was of an age where the consent of parents was required by statute, not, however, as an essential. She had progressed slightly beyond that period when infancy is a genuine impediment; so that the case was perhaps without precedent, and Walker, J., dissented from the judgment because of her legally sufficient age.

¹ *Lyndon v. Lyndon*, 69 Ill. 48; *Walker, J.*, *dis.* It was here intimated that had the parties lived voluntarily together as man and wife, the girl

knowing of the perjury, the marriage would have been valid. See *Fraud, Force, and Error, post*; *Harford v. Morris*, 2 Hag. Con. 428; *Robertson v. Cole*, 12 Tex. 356.

² *Aymar v. Roff*, 3 Johns. Ch. 49. As to consent of parents and guardians *see post*.

³ *Cro. Eliz.* 858; 1 *Salk.* 121; 2 *Kent Com.* 79, and notes; 1 *Bish. Mar. & Div.* §§ 296-303, and authorities cited; *Shelf. Mar. & Div.* 224; *Hyde v. Hyde*, L. R. 1 P. & D. 130.

dissolve the union, so long as both parties are actually living, even though lapse of time should raise a reasonable supposition of death. But to render the second marriage void at law, the first should have been valid in all respects.¹ Some of the harsher features of the old law have been softened in our own legislation; and statutes are not uncommon which possibly extend facilities for divorce from the old relation, and in any event protect the offspring of a new marriage contracted erroneously, but in good faith, by parties who had reason to believe a former spouse dead.² So, too, polygamy in fact is relieved of its penal consequences as concerns parties not guilty of polygamy in intention; but a certain period must elapse — usually seven years — before death can be presumed from one's mere continuous absence without being heard from. Such was one of the provisions in the English statute passed to make bigamy a civil offence, in the reign of James I.,³ which also exempted from punishment for bigamy persons re-married during the lifetime of the former spouse after a divorce, sentence of nullity, or disaffirmance on reaching age of consent. Similar statutes for the punishment of bigamy, with similar reservations, are enacted in this country; but in England and the United States some defects of the original legislation are now cured, and divorce from bed and board would not exempt an offender from prosecution.⁴ Polygamy, with such exceptions, remains an indictable offence. One of its less obvious evils — though not the least important when polygamy is regarded as a legalized institution in a free country — is that the patriarchal principle which it introduces is thoroughly hostile to free institutions; this fact was pointed out many years ago by one of our best writers on political ethics.⁵

¹ *Bruce v. Burke*, 2 Add. Ec. 471; years; in Massachusetts, seven years, 2 Eng. Ec. 381; *Reg. v. Chadwick*, 12 Jur. 174; *Patterson v. Gaines*, 6 How. (U. S.) 550. but with a special relaxation of the penalty. Still further, see 2 Kent Com. 79, and notes. See also *Stata. 9 Geo. IV. c. 81*; 24 & 25 Vict. c. 100; 1 Bish. § 297. Legitimizing statutes are to be found in numerous States on behalf of the offspring of innocent marriages of this kind. 1 Bish. § 301, cases *infra*.

² See N. Y. Rev. Stat. Vol. 2, p. 139, §§ 6, 7; Mass. Gen. Sta. c. 107, §§ 4, 30.

³ Stat. 1 Jac. I. c. 11, 1604. See *Queen v. Lumley*, L. R. 1 C. C. 196; *Queen v. Curgerwen*, L. R. 1 C. C. 1.

⁴ In New York, the period of absence is five years; in Ohio, three

⁵ 2 Lieber Pol. Ethics, 9, cited in note to 2 Kent Com. 81.

Nor is a new marriage entered into by one spouse in good faith, and in full but erroneous belief that the other spouse is dead, valid even after the lapse of the statutory absence; such parties are not free to marry again, but only relieved of the worst consequences.¹

In application of these broad principles, the welfare of the community has been regarded, and likewise the injury inflicted by a polygamous and void marriage upon the innocent party who is made the victim of deception. Prosecutions for bigamy have been sustained against a prisoner whose second marriage was within the prohibited degrees of affinity, or one who, unknown to his partner, assumed a false name in avoidance of proper ceremonies.² In such indictments the rule that a marriage solemnized by a priest, under which the parties have cohabited as husband and wife, is *prima facie* a marriage everywhere, will apply.³ And a sham divorce, wrongfully procured and null, affords neither justification for a new marriage, nor defence to an indictment for bigamy.⁴

A marriage with one whose spouse is still living being void, the innocent party who was misled into that bigamous match is under no disability, in consequence, from marrying again; and hence, though the bigamous husband still lives, the second woman he took is free to accept another.⁵ Where the court interposes to declare the bigamous marriage void, as prudence requires, or perhaps some statute mitigating the consequences, it insists upon the innocence of the person

¹ *Glass v. Glass*, 114 Mass. 563, and cases cited; *Williamson v. Parisien*, 1 Johns. Ch. 389; *Miles v. Chilton*, 1

Robertson, 684; *Spicer v. Spicer*, 16 Abb. Pr. N. S. 112; 1 Bish. Mar. & Div. § 299. Such marriage, under Massachusetts statutes, may be annulled by a

sentence containing (in order to make children begotten before the commencement of the suit legitimate), the statement that it was contracted in good faith and with the full belief of the parties that the absent spouse was dead. *Glass v. Glass*, *supra*. Lawful competence to marry again results, however, under some local statutes, from such absence. *Strode v. Strode*, 3 Bush, 227.

² *Queen v. Allen*, L. R. 1 C. C. 367; *Queen v. Rea*, L. R. 1 C. C. 365. See also "Bigamy," in Bishop or Wharton on Criminal Law.

³ *Commonwealth v. Kenney*, 120 Mass. 387; *Taylor v. State*, 52 Miss. 84. And see *Blossom v. Barrett*, 37 N. Y. 434, for circumstances under which the woman fraudulently induced to enter into a void marriage of this sort may sue the man in damages.

⁴ *People v. Dawell*, 25 Mich. 247.

⁵ *Reeves v. Reeves*, 54 Ill. 332; *Drummond v. Irish*, 52 Iowa, 41.

asking relief.¹ Judicial action, however, is not always essential for such a purpose; and a marriage void, and not merely voidable, may be assumed to leave the party who is free from other conjugal relations at liberty to marry again;² the burden of impeaching a new marriage on the ground of the old lies on the impeaching party, and the conviction of the guilty bigamist has nothing to do with the case.³ But, as Mr. Justice Wayne once observed, prudence and delicacy impose such restraints until the fact is so generally known as not to be a matter of doubt, or until the former marriage "has been impeached in a judicial proceeding, wherever that may be done."⁴

§ 26. *Impediments following Divorce.* — Under this same head may be considered a disqualification introduced into some parts of this country by legislative enactments; namely, the impediment which follows divorce.⁵ A divorce *a vinculo* should on general principles leave both parties free to marry again. But such is not always the case. Thus in Kentucky the person injured may not marry again before the expiration of two years from the decree of dissolution.⁶ And in several States the guilty party is prohibited from marrying again during the lifetime of the innocent spouse divorced,—a provision of law seemingly more judicious to apply *in terrorem* by way of prevention than as a suitable method of punishment.⁷ In Scotland there is a peculiar, but not unreasonable, law which forbids the guilty party after divorce from marrying the *particeps criminis*; this was framed evidently to defeat collusive practices between persons desiring to put away an outstanding obstacle to their own union.⁸

Rules applicable to this special topic may be better understood when we come to investigate the law of divorce. The

¹ *Tefft v. Tefft*, 35 Ind. 44; 1 Bish. § 300.

² Certainly if deceived in the bigamous marriage. *Patterson v. Gaines*, 6 How. U. S. 550. And even if not deceived. *Martin v. Martin*, 22 Ala. 86.

³ *Patterson v. Gaines*, *supra*; 1 Bish. § 299.

⁴ *Patterson v. Gaines*, 6 How. U. S. 550. A cause of action to annul a mar-

riage by reason of a former marriage ought not to be joined with causes relative to matrimonial property. *Uhl v. Uhl*, 52 Cal. 250.

⁵ 1 Bish. Mar. & Div. 5th ed. §§ 804-807.

⁶ *Cox v. Combs*, 8 B. Monr. 231.

⁷ See *Parke v. Barron*, 20 Ga. 702; *Clark v. Cassidy*, 62 Ga. 407; *Kinnier v. Kinnier*, 53 Barb. 454.

⁸ 1 Fras. Dom. Rel. 82.

statutes themselves, however, have received very little authoritative exposition. Some of them, while providing for a grant of leave by the court to marry again, are enabling and not restrictive in character, and hence do not bind persons who are at liberty to marry without the judicial sanction.¹ By marrying *bona fide* in another State, having gone thither without intent to evade the laws of the State where the divorce was procured, the divorced person may likewise escape punishment; so strenuously is marriage upheld the world over, when valid in the place of contract and intended domicile, and not seriously offensive to good morals.² On the other hand, where one party in a case of divorce, being under the impediment of the statute, and within proper jurisdiction, marries again during the life of the other party, the new marriage is null; and if, after the impediment is removed by statutory lapse of time, leave of court to marry again, or the death of such other party, they who have thus erred enter into no new contract or ceremony of marriage, but continue cohabiting on the faith of the null marriage, their belief that it was legal will not render it so or shield them from the consequences.³

§ 27. Force, Fraud, and Error in Marriage. — *Seventh.* All marriages procured by force or fraud, or involving palpable error, are void; for here the element of mutual consent is wanting, so essential to every contract.⁴ The law treats a matrimonial union of this kind as absolutely void *ab initio*, and permits its validity to be questioned in any court; at the option, however, of the injured party, who may elect to abide by the consequences when left free to give or withhold assent. Force implies a physical constraint of the will; fraud, some deception practised, whereby an unnatural state of the will is brought about.⁵ Cases of palpable error, which are very rare, usually contain one or both of these ingredients.

¹ Bullock v. Bullock, 122 Mass. 8. Morris, 2 Hag. Con. 428; 4 Eng. Ec.

² See Commonwealth v. Lane, 113 Mass. 458; Conflict of Laws, *post*. 575; Countess of Portsmouth v. Earl of Portsmouth, 1 Hag. Ec. 355; 3 Eng.

³ Thompson v. Thompson, 114 Mass. 586; Collins v. Collins, 80 N. Y. 1. Ec. 154; Scott v. Shufeldt, 5 Paige, 43; Dalrymple v. Dalrymple, 2 Hag. Con. 54, 104; 4 Eng. Ec. 485; Keyes v. Keyes, 2 Fost. 553.

⁴ 2 Kent Com. 76, 77; 1 Bish. Mar. & Div. 5th ed. §§ 164-215; Harford v. Keyes, 2 Fost. 553.

⁵ 1 Fras. Dom. Rel. 234.

What amount of force is sufficient to invalidate a marriage is a question of circumstances. Evidently the same test could not apply to the mature and the immature, to the strong and the weak, to man and to woman. The general rule is that such amount of force as might naturally serve to overcome one's free volition and inspire terror will render the marriage null.¹ And where the party employing force sustains a superior relation of influence, or a post of confidence affording him opportunities which he chooses to abuse, this circumstance carries great weight. Thus in *Harford v. Morris*, where one of the guardians of a young and timid school-girl, having great influence and authority over her, took her to a foreign country, hurried her from place to place, and then married her without her free consent, the marriage was set aside;² and similar consequences attended more recently the marriage of a young school-girl to her father's coachman, who pursued his scheme while taking her out to ride.³

So marriage by compulsion is procured when one under illegal arrest is forced to marry; and so probably, though the arrest was legal, if malicious circumstances are manifest.⁴ But if a single man under legal arrest, by advice of the officer or magistrate, marries the woman whom he has seduced or got with bastard offspring, in order to escape prosecution, the law will favor a presumption of honest repentance on his part, and hold him bound;⁵ substantial justice being thereby done to the utmost, and the lesser scandal to society permitted in order to avert the greater.

¹ Shelf. Mar. & Div. 218; 1 Bish. Mar. & Div. 5th ed. § 211.

² 2 Hag. Con. 423; 4 Eng. Ec. 575.

³ Lyndon v. Lyndon, 69 Ill. 48.

⁴ Reg. v. Orgill, 9 Car. & P. 80; Soule v. Bonney, 37 Me. 128; Collins v. Collins, 2 Brews. (Pa.) 515; Barton v. Morris, 15 Ohio, 408; Benton v. Benton, 1 Day, 111; 1 Bish. Mar. & Div. 5th ed. § 212.

A man is sometimes forced into a marriage which ought to be annulled. See Bassett v. Bassett, 9 Bush, 696. In Willard v. Willard, 6 Baxter, 297, before testimony was taken, an allegation

of duress was sustained against demurrer. Here the man claimed that the woman's brother seized him on the highway, and forced him to marry her, and that as soon as the duress was over he escaped; also that the woman had a child three months afterwards. Duress was claimed by the husband in *Vroom v. Marsh*, 29 N. J. Eq. 15, but the court allowed alimony *pendente lite* to the wife, she denying the charge.

⁵ Jackson v. Winne, 7 Wend. 47; Sickles v. Carson, 26 N. J. Eq. 440; Honnett v. Honnett, 38 Ark. 156; State v. Davis, 79 N. C. 603; Johns v. Johns,

As to fraud, in order to vitiate a marriage, it should go to the very essence of the contract. But what constitutes this essence? The marriage relation is not to be disturbed for trifles, nor can the cumbrous machinery of the courts be brought to bear upon impalpable things. The law, it has been well observed, makes no provision for the relief of a blind credulity, however it may have been produced.¹ Fraudulent misrepresentations of one party as to birth, social position, fortune, good health, and temperament, cannot therefore vitiate the contract. *Caveat emptor* is the harsh but necessary maxim of the law. Love, however indispensable in an æsthetic sense, is by no means a legal essential to marriage; simply because it cannot be weighed in the scales of justice. So, too, all such matters are peculiarly within the knowledge of the parties themselves, and they are put upon reasonable inquiry.

Not even does the concealment of previous unchaste and immoral behavior in general vitiate a marriage; for although this seems to strike into the essence of the contract, yet public policy pronounces otherwise, and opens marriage as the gateway to repentance and virtue.² If the profligate continue a profligate after marriage, the divorce laws afford a means of escape to the deluded victim. Still, as this doctrine seems to bear hard upon innocent persons marrying in good faith and with misplaced confidence, it is applied not without some limitations. Thus it is held in Massachusetts that where a woman, pregnant by another man at the time of the nuptials, bears a child soon after to an innocent husband, the marriage may be avoided by him; for she has thereby not only inflicted upon him, by deception, the grossest possible moral injury, but subjected them both to scandal and ill-repute.³ The same court, however, has taken heed not to press

44 Tex. 40; Williams v. State, 44 Ala. 24.

¹ Lord Stowell, in Wakefield v. Mackay, 1 Phillim. 137; 2 Kent Com. 77; 1 Bish. Mar. & Div. 5th ed. §§ 166-168.

² 1 Bish. Mar. & Div. §§ 170, 179; Rogers Ec. Law, 2d ed. 644; 1 Fras. Dom. Rel. 231; Ayl. Parer. 362, 363;

Swinb. Spousals, 2d ed. 162; Best v. Best, 1 Add. Ec. 411; 2 Eng. Ec. 168; Leavitt v. Leavitt, 13 Mich. 452; Wier v. Still, 31 Iowa, 107.

³ Reynolds v. Reynolds, 3 Allen, 606. See also Baker v. Baker, 13 Cal. 87; Montgomery v. Montgomery, 8 Barb. Ch. 132; Morris v. Morris, Wright, 630.

this exception far, refusing to allow one to shake off the obligations he has contracted with a woman whom he knew before marriage to be with child, and in fact had himself debauched, notwithstanding he married upon the faith of her previous assurances that her pregnancy was by him, and was undeceived by the time the child came into the world.¹ And, furthermore, if a man marries any woman whom he knows to be unchaste and pregnant, it is his own folly if he places implicit confidence in any of her statements.² But whenever an innocent man marries a woman, supposing her, with reason, to be virtuous, and she conceals her pregnancy from him, the subsequent production of another man's child so unpleasantly complicates the marriage relation that he ought to be allowed his exit if he so desires, both in justice to himself and because the woman knew the risk she ran of bringing the parental relation to shame by marrying, and chose to incur it. In short, while marriage may be accepted by any one whose past life has been dissolute, as the portal to a new and honest career, for which reason concealment of the past cannot legally be predicated of either party as an essential fraud, we apprehend that the woman who brings surreptitiously to the marriage bed the incumbrance of some outside illicit connection introduces a disqualification to the union as real as the physical impotence of a man would be, resulting from his own lasciviousness.

§ 27 *a*. **The same Subject.** — As to error, it may be said, as in fraud, that the error should reach the essentials; and Chancellor Kent justly observes that it would be difficult to find a case where simple error, without some other element, would be permitted to vacate a marriage.³ There is an English case in point where a man courted and afterwards married a young lady, believing her to be a certain rich widow, whom he had known only by reputation. She and her friends had coun-

¹ *Foss v. Foss*, 12 Allen, 26. It was here suggested by the court that the man might have taken medical or other advice before marriage, instead of relying upon the woman's word. In the former case a man would not have been expected to take such precautions.

² *Crehore v. Crehore*, 97 Mass. 330.

³ 2 Kent Com. 77. See Lord Campbell, in *Reg. v. Millis*, 10 Cl. & F. 534, 785; 1 Bish. Mar. & Div. 5th ed. § 207; *Clowes v. Clowes*, 3 Curt. Ec. 185, 191.

tenanced the deception. It was held, nevertheless, that the marriage must stand.¹ But the palpable substitution of some other individual for the person actually accepted and intended for marriage may properly be repudiated by the victim to the fraud.² And some cases have gone even farther, as where a scoundrel palms himself off as a certain individual of good repute; ³ though, generally speaking, deception as to name is not regarded as more fatal than deception as to character or fortune.

The element of imperfect consent is readily associated with cases of the present class. Thus, if a person is unwittingly entrapped into a marriage ceremony, not meaning nor affording reason for the other party to believe that it should be binding, this marriage may be repudiated.⁴ And in general a mock marriage in jest is no marriage.⁵

In most of the reported cases of force, fraud, and error, two or more of these elements are united; and frequently another distinct impediment appears, such as tender years on the part of the injured party; or, with regard to the offender, the suppression of material facts relative to some former marriage, or to his own mental or physical incapacity; or some other cause of nullity is shown by the evidence. In the reported cases, where the complainant was successful, some unprincipled man has generally sought to gain undue advantages from the person and fortunes of one whose feebler will rendered her an easy prey; it rarely, if ever, appears that such force or fraud led to a reasonable and well-assorted match. Such unequal alliances need find favor from no tribunal.⁶

§ 28. **Avoidance of Marriage for Force, Fraud, and Error.**—

All marriages of this sort are binding without further ceremony, provided the injured party sees fit to affirm it after all constraint is removed, or, in other words, to perfect the con-

¹ Feilding's Case, cited in Burke's Celebrated Trials, 68, 78, and in 1 Bish. Mar. & Div. 5th ed. § 204.

² Fiction supplies such instances, as in Scott's novel of St. Ronan's Well. And see 2 Kent Com. 77; 1 Bish. § 207.

³ Rex v. Burton, 3 M. & S. 587.

⁴ Clark v. Field, 13 Vt. 460.

⁵ McClurg v. Terry, 21 N. J. Eq. 225. See *post*, § 80.

⁶ See Heffer v. Heffer, 8 M. & S. 265; Rex v. Burton-upon-Trent, 3 M. & S. 537; Swift v. Kelly, 8 Knapp, 257; Nace v. Boyer, 6 Casey, 99; Robertson v. Cole, 12 Tex. 356; Cameron v. Malcolm, Mor. 12586, cited 1 Bish. § 199; Lyndon v. Lyndon, 69 Ill. 48; Powell v. Cobb, 3 Jones Eq. 456.

sent; but no such freedom of choice seems to be left to the offending party. Hence, this sort of marriage seems neither void nor voidable in the legal acceptation; but rather inchoate or incomplete until ratified, though void if the injured choose so to treat it. Where consummation never followed the nuptials, the courts are the more readily disposed to set aside the match;¹ but in any event copulation, with knowledge of the fraud, and after removal of all constraint, is an effectual bar to relief.²

The issue, we may add, is between the offender and the injured party, and third persons have no right to interfere, although it be alleged that there was intent to defraud them in their own property interests.³ In fact, marriage stands or falls by public permission with reference only to the marriage parties; and wherever they have legally assumed the relation as one agreeable to themselves, outsiders cannot meddle with the status from outside considerations. Where, too, a marriage has been effected through the fraudulent conspiracy of third persons, the rule is that, unless one of the contracting parties is cognizant of the fraud, the marriage is perfect; but, if cognizant, it is to be deemed the fraud of such party and treated accordingly.⁴

§ 29. *Essential of Marriage Celebration.* — *Eighth.* We are now brought to the important subject of the formal marriage celebration. Here there is a wide difference noticeable between general principles and established practice. We are to consider this topic, then, in two separate aspects: first, as to marriage observance in the absence of civil requirements; second, as to marriage observance under the statutes now in force in England and America.

§ 30. *Perfect and Imperfect Consent.* — It is to be premised, however, by way of enlarging upon the idea of perfect and

¹ *Lyndon v. Lyndon*, 69 Ill. 43; *Robertson v. Cole*, 12 Tex. 356; *Cameron v. Malcolm*, *supra*.

² 1 Bish. Mar. & Div. 5th ed. §§ 214, 215; 1 Burge Col. & For. Laws, 137; 1 Fraas. Dom. Rel. 229; *Scott v. Shufeldt*, 5 Paige, 43; *Leavitt v. Leavitt*,

13 Mich. 452; *Hampstead v. Plaistow*, 49 N. H. 84.

³ *McKinney v. Clarke*, 2 Swan, 321.

⁴ *Sullivan v. Sullivan*, 2 Hag. Con. 238, 246; *Rex v. Minshull*, 1 Nev. & M. 277; 1 Bish. Mar. & Div. § 178, *et seq.*; *Barnes v. Wyethe*, 28 Vt. 41; *Bassett v. Bassett*, 9 Bush, 696.

imperfect consent suggested under the last head, that some form of marriage promise, some ceremony, however slight, has always been deemed essential to the validity of marriage. The common language of the books is, that, in the absence of civil regulations to the contrary, marriage is a contract, and nothing but mutual consent is required. And the old maxim of the Roman law is quoted to support this view: *Nuptias non concubitus, sed consensus facit*.¹ But is there not an ambiguity in the use of such language? For it is material to ask whether *consensus* or *consent* is used in the sense of simple volition or an expression of volition. We maintain that the latter is the correct legal view; and that it should be said that the law requires in such cases a *simple expression of mutual consent*, and no more. For the very definition of marriage implies that there should be not only the consenting mind, but an expression of the consenting mind, by words or signs, which expression in proper form constitutes in fact the marriage agreement. It is in this sense that we shall apply the terms *formal* and *informal* to marriage in the following sections.

§ 31. **Informal Marriage; Words of Present Consent, or of Future Consent, &c.** — To constitute a marriage, then, where there are no civil requirements, — or, in other words, to constitute an informal marriage, — words clearly expressing mutual consent are sufficient without other solemnities. Two forms of consent are mentioned in the books: the one, consent *per verba de presenti*, with or without consummation; the other, consent *per verba de futuro*, followed by consummation.² Some writers have added a third form of consent, — by habit and repute; but this is, very clearly, nothing more than evidence of consummated marriage amounting to a presumption conclusive enough for the purpose at hand.³ So, too, there is reason to suppose that the marriage *per verba de futuro* is of the same sort as the former; marriage *per verba*

¹ See 2 Kent Com. 86, 87; Co. Litt. 38 a; 1 Bish. Mar. & Div. §§ 218–267.

² Swinb. Spousals, 2d ed. 8; 2 Burn Ec. Law, Phillim. ed. 455 e; Lord Cottingham, in *Stewart v. Menzies*, 2 Rob. Ap. Cas. 547; 1 Bish. Mar. & Div. 5th ed. § 227.

³ Lord Selborne, in the recent case of *De Thoren v. Attorney-General*, 1 H. L. App. 686, confirms this view. See also *Breadalbane's Case*, L. R. 1 H. L. Sc. 182.

de præsenti constituting the only real marriage promise, while consummation following *de futuro* words of promise raises a legal presumption, not probably conclusive, that words *de præsenti* afterwards passed between the parties. The copula is no part of the marriage; it only serves to some extent as evidence of marriage.¹ *Consensus, non concubitus*, is the maxim of the civil, ecclesiastical, and common law alike.²

Informal celebration constitutes marriage as known to natural and public law. The English canon law as it stood previous to the Council of Trent, the law of Scotland, the law of some of the United States, and perhaps the common law of England, all dispense with the ceremonial observances of formal marriage.³ Informal marriage is to be sustained on the theory that an institution of such fundamental importance to our race ought to be good, independently of, and prior to, the formal requirements which human government imposes at an advanced stage of society. But, as we shall see, the marriage acts now in force in England and many of the United States render certain solemnities, religious or secular, indispensable. Most of the continuous decisions relating to informal marriages are therefore to be found in the Scotch reports, where the general doctrine has been pretty fully discussed. And the great, the almost insuperable, difficulty which presents itself at the outset in such cases is thus clearly indicated by Lord Stowell in *Lindo v. Belisario*: "A marriage is not every carnal commerce; nor would it be so even in the law of nature. A mere carnal commerce, with-

¹ *Port v. Port*, 70 Ill. 484; 1 Bish. Mar. & Div. 6th ed. §§ 228, 254; *Jackson v. Winne*, 7 Wend. 47; *Dumaresly v. Fishly*, 3 A. K. Marsh. 368, 372; *Peck v. Peck*, 12 R. I. 485.

² *Dalrymple v. Dalrymple*, 2 Hag. Con. 54; 4 Eng. Ec. 485, 489; *Shelf. Mar. & Div.* 6-7.

³ Informal marriage has been recognized to a greater or less extent in the United States. *Post*, § 34; *Dickerson v. Brown*, 49 Miss. 357; *Hutchins v. Kimmell*, 31 Mich. 126; *Port v. Port*, 70 Ill. 484; *Lewis v. Ames*, 44 Tex. 319;

Dyer v. Brannock, 66 Mo. 391; *Campbell v. Gullatt*, 43 Ala. 57; *Askew v. Dupree*, 30 Ga. 173. But Maryland repudiates the doctrine of informal marriages: *Denison v. Denison*, 35 Md. 361; as, by force of statute or otherwise, do certain other States. See 1 Bish. § 279; *Estill v. Rogers*, 1 Bush, 62; *Holmes v. Holmes*, 1 Abb. (U. S.) 525; *Robertson v. State*, 42 Ala. 509; *State v. Miller*, 23 Minn. 352; *Commonwealth v. Munson*, 127 Mass. 459; *State v. Hodgskins*, 19 Me. 155.

out the intention of cohabitation and bringing up of children, would not constitute marriage under any supposition. But when two persons agree to have that commerce for the procreation and bringing up of children, and for such lasting cohabitation,—that, in a state of nature, would be a marriage; and, in the absence of all civil and religious institutions, might safely be presumed to be, as it is properly called, *a marriage in the sight of God.*"¹ Did parties therefore coming thus together mean fornication or did they mean marriage?

Here it is seen that there should not only be words of promise, but that they should be uttered with matrimonial intent. To ascertain the purpose of the parties in each case, the courts will look at all the circumstances, and even admit parol evidence to contradict the terms of a written contract; in this respect modifying the ordinary rules of evidence. For writings of matrimonial acknowledgment may have been interchanged as a blind or cover for some scheme well understood between the parties.² Or again by way of jest.³ But, in cases of doubt, the rule is to sustain the marriage as lawful and binding. If there has been continued intercourse between the parties, this presumption becomes of course still stronger. And if promises were exchanged while one acted in good faith and in earnest, the other is not permitted to plead a mental reservation.⁴

Hence, we may observe, generally, that a betrothal followed by copulation does not make this informal marriage a legal one, when the parties looked forward to a formal marriage ceremony, and did not agree to become husband and wife without it.⁵ If, too, a woman, in surrendering her person to a man, is conscious that she is committing an act of

¹ 1 Hag. Con. 216; 4 Eng. Ec. 367, 374. See 1 Bish. Mar. & Div. 5th ed. §§ 216-267, and cases cited; 2 Kent Com. 86 and n.; 1 Fras. Dom. Rel. 149, 184, 187, 212.

² Dalrymple v. Dalrymple, 2 Hag. Con. 54, 105; 4 Eng. Ec. 485, 508, 509, cited in 1 Bish. Mar. & Div. 5th ed. §§ 289-241.

³ *Ib.*; *supra*, § 27; McClurg v. Terry, 21 N. J. Eq. 225; Clark v. Field, 13 Vt. 460.

⁴ *Ib.* And see 1 Fras. Dom. Rel. 213; Lockyer v. Sinclair, 8 Scotch Sess. Cas. n. s. 582.

⁵ Peck v. Peck, 12 R. I. 485; Beverson's Estate, 47 Cal. 621.

fornication instead of consummating such a marriage, the copula cannot, for her sake, be connected with any previous words of promise so as to constitute a marriage.¹ And a union once originating between man and woman, purely illicit in its character, and voluntarily so, there must appear some formal and explicit agreement between the parties thereto, or a marriage ceremony, or some open and visible change in their habits and relations, pointing to honest intentions, before their alliance can be regarded as converted into either a formal or an informal marriage.²

Nor is the issue between informal marriage and illicit intercourse to be concluded by the conduct of the pair towards society. They may, for convenience or decency's sake, hold themselves out to third persons as man and wife, while yet sustaining at law, and intentionally, a purely meretricious relation.³

And yet a proper regard for the real intention of the cohabiting pair encourages often the presumption of innocence and good faith, even where the relation assumed was an illegal one. Supposing two persons to have made an informal marriage, in the mistaken belief that the former spouse of one of them was already dead, or that some sentence of divorce left them, in like manner, free to unite. This case should be distinguished from that of some original understanding for a mere carnal commerce. And if the impediment becomes removed in the course of their cohabitation under such circumstances, and the pair live continuously together as man and wife, no new ceremony, agreement, or visible change in their relation would probably be deemed requisite to establish matrimonial consent subsequent to the removal of the impediment; for here the original intention continues, but in the case of carnal commerce necessarily changes, in order that an honest relation may be presumed.⁴

¹ *Port v. Port*, 70 Ill. 484.

² See *Floyd v. Calvert*, 53 Miss. 37; *Duncan v. Duncan*, 10 Ohio St. 181; *Hunt's Appeal*, 86 Penn. St. 294; *Williams v. Williams*, 46 Wis. 464; *Barnum v. Barnum*, 42 Md. 251. Perhaps the Scotch law is less emphatic on this point. It is stated in *Breadalbane's*

Case, L. R. 1 H. L. Sc. 182, that a connection beginning as adulterous may, on ceasing to be so, become matrimonial by consent and evidenced by habit and repute, without a public act.

³ *Howe's Estate*, *Myrick's Probate*, 100.

⁴ See *De Thoren v. Attorney Gen-*

Disbelief in ceremonials, or conscientious scruples, may be alleged in support of an informal marriage, by way of preference, where such latter marriage is held lawful, and the parties mutually contracted with the view of a lawful union.¹

§ 32. **The Same Subject.** — A late interesting Scotch case illustrates the painful uncertainty which hangs about these informal marriages. A baronet of forty, and a bachelor, whose dissolute habits were notorious, had somewhat intimate relations with the family of a man who made fish-tackles. Entertained at the latter's house, on a birthday occasion, with a champagne supper, after which allusion was made by the host to the bad name he was getting with having the baronet so much among his daughters, the titled guest offered to shut people's mouths; he was poor and could not marry now, he said, but would marry after Scotch fashion. Then, kneeling before one of the daughters, a damsel of sixteen, he took a ring from his pocket, placed it upon her third finger, and said to her, "Maggie, you are my wife before Heaven, so help me, O God!" and the two kissed each other. The daughter said, "Oh, Major!" and put her arms around his neck. The baronet and the daughter were then "bedded" according to the old Scotch fashion. They lived together for some weeks after this celebration, and met at various times, but there appears to have been no continuous cohabitation. In about thirteen months Maggie had a boy, whom she registered as illegitimate; and some eighteen months later still, the baronet died. The parties to this hasty and apparently unpremeditated union had not, meantime, represented themselves as husband and wife; and as for the baronet, he denied to others that such relation existed, until, when lying at the point of death in delirium tremens, he seemed doubtfully to admit it. Now, here was an informal marriage, with words of suitable import, solemn and precise, followed by consummation. Sup-

eral, 1 H. L. App. 686, where the impediment followed divorce; here it was held, in conformity with the rule above stated, that matrimonial consent after the marriage impediment was removed might be presumed.

¹ See *Bissell v. Bissell*, 55 Barb. 825. *Aliter*, where statutes positively require a ceremonial marriage. See *post*, § 84, as to formal marriage.

posing this ceremony to have been with marriage intention, there was no reason for disputing its validity; nor, indeed, on the girl's behalf, provided she took all in seriousness, even though the baronet himself jested. To be sure, he might have been maudlin at the moment, on which point, however, the case did not turn. The British House of Lords reversed the decision of the Scotch Court of Sessions, mainly upon circumstantial proof that both parties, by behavior subsequent to the ceremony, repudiated its force, and that neither, in fact, had been in earnest. The present issue involved the inheritance of the baronet's estate at some lapse from his death. Both parents of the girl were now dead; the baronet had begotten illegitimate offspring during his life elsewhere; and instead of asserting upon his death, as she might, that this boy was his lawful child, Maggie had at first claimed only a bastard's support for him.¹

§ 33. *The Same Subject*. — Words of present promise, in order to constitute an informal marriage, must contemplate a present, not a future, assumption of the status. And herein lies a difficulty: that of discriminating between actual marriage and what we now commonly term an engagement. If the agreement be by words of present promise, — as if the parties should say, "We agree to be henceforth man and wife," — the marriage is perfect. The form of expression is not material.² And Swinburne says that though the words should not of themselves conclude matrimony, yet the marriage would be good if it appeared that such was the intent.³ The proposal of one must be actually accepted by the other; yet such acceptance may be indicated by acts, such as a nod or courtesy. The mutual consent may be expressed orally or in writing.⁴ Written promises are of course unnecessary; though the reported cases show frequently letters or other writings interchanged, from which the intent was gathered. And in the celebrated Scotch case of *Dalrymple v. Dalrymple*,

¹ *Steuart v. Robertson*, L. R. 2 H. L. Sc. 494.

² 1 Bish. Mar. & Div. 5th ed. §§ 227, 229; 1 Fras. Dom. Rel. 145-149.

³ Swinb. Spousals, 2d ed. 87.

⁴ See *Sapp v. Newsom*, 27 Tex. 537,

where marriage by means of mutually executing a bond or contract is sustained under the old law, which was of Spanish origin. But cf. *State v. Miller*, 23 Minn. 352.

a marriage promise was established from the successive united acknowledgments of the parties as man and wife, the writings having been preserved by the lady and produced by her at the trial. In this case the principle was sustained, that words importing secrecy or alluding to some future act or public acknowledgment, when superadded to words of present promise, do not invalidate the agreement.¹ More uncertainty arises in matrimonial contracts where a condition inconsistent with marriage is superadded; as if parties should agree to live together as man and wife for ten years; but *bona fide* intent may be fairly presumed where there are no special circumstances to throw light upon the conduct of the parties.²

Marriage by words of future promise is consummated when two persons agree to marry at some future period and afterwards actually do cohabit. The foundation of this doctrine is the presumption that the parties meant right rather than wrong, and hence that copulation was permitted on the faith of the marriage promise. But in this class of cases it is requisite that the promise *de futuro* should be absolute and mutual and in good faith. Mere courtship does not suffice, though followed by carnal intercourse.³ Nor in general do words of promise with immoral conditions annexed. It is admitted that no familiarities short of the *copula* will convert such loose espousals into matrimony.⁴ It is not clear whether cohabitation after *verba de futuro* raises ever a conclusive presumption of marriage at law or not: unquestionably the more reasonable doctrine, however, is that it does

¹ Dalrymple v. Dalrymple, 2 Hag. Con. 54; 4 Eng. Ec. 485; McInnes v. More, Ferg. Consist. Law Rep. 33; Hoggan v. Cragie, Maclean & Rob. 942.

² See 1 Bish. Mar. & Div. 5th ed. §§ 245-250; Currie v. Turnbull, Hume, 373; 1 Fras. Dom. Rel. 154. See Hamilton v. Hamilton, 9 Cl. & F. 327; Hantz v. Sealy, 6 Binn. 405; Robertson v. Cowdry, 2 West. Law Jour. 191; and in Bish. *supra*. Bissell v. Bissell, 55 Barb. 325, shows an interesting state of facts, upon which it was decided that the marriage was valid.

³ Reid v. Laing, 1 Shaw App. Cas. 440; Morrison v. Dobson, 8 Scotch Sess. 347, cited 1 Bish. § 253; Breadalbane's Case, L. R. 1 H. L. Sc. 182; Stewart v. Menzies, 2 Rob. App. Cas. 547, 591; 1 Fras. Dom. Rel. 188; Reg. v. Millis, 10 Cl. & F. 534, 780; Peck v. Peck, 12 R. I. 485; Beverson's Estate, 47 Cal. 621; Dumaresly v. Fishly, 3 A. K. Marsh. 868; 1 Bish. Mar. & Div. 5th ed. §§ 253-265, and other cases cited; Port v. Port, 70 Ill. 484; § 38 *post*.

⁴ 1 Bish. § 253.

not, and that the intent of the parties may be shown as in other cases.¹ But innocence will be inferred, if possible, rather than guilt.² So it has been said that where a legal impediment exists to a marriage between persons living in licentious intercourse, as the impediment sinks the status rises.³ In New York this doctrine of marriage by words *de futuro* is utterly repudiated, and in other States it is maintained quite broadly that all informal marriages were unknown to the English common law.⁴ This last has been long a mooted point in the courts, and will ever remain so; but whatever may have been the historical fact, certain it is that the necessity of a more formal observance of marriage has been almost universally recognized; and the very words, "marriage in the sight of God," so familiar to the readers of the Scotch matrimonial law, not only import the peculiar embarrassments which attend the justification of such loosely contracted alliances before the world, but attest the solemn character of this institution.⁵

§ 34. **Formal Marriage; Regular Celebration.** — All the learning of informal marriages, if there was ever much of it, was swept out of the English courts when formal religious celebration was prescribed by positive statute. Ceremonials had long been required by those canons upon which the ecclesiastical law was based. Lord Hardwicke's Act, passed in the reign of George II.,⁶ is the most famous of these statutes.

¹ See chapter *post*, on Breach of Promise. Seduction under breach of promise does not constitute a marriage. See, too, *Morrison v. Dobson*, 8 Scotch Sess. 347.

² See *Cheney v. Arnold*, 15 N. Y. 345; *Duncan v. Duncan*, 10 Ohio St. 181; and comments of Mr. Bishop, *supra*, §§ 255-258; *Reg. v. Millis*, 10 Cl. & F. 534; *Swinb. Spousals*, 2d ed. 225, 226; *Robertson v. State*, 42 Ala. 509.

³ 1 Bish. Mar. & Div. 5th ed. § 248; *De Thoren v. Attorney-General*, 1 H. L. App. 686.

⁴ *Cheney v. Arnold*, 15 N. Y. 345. But see 1 Bish. §§ 255-258; *Bissell v. Bissell*, 55 Barb. 325. And see *Denison v. Denison*, 35 Md. 361; *supra*,

§ 31, notes; *Holmes v. Holmes*, 1 Abb. (U. S.) 525; *Duncan v. Duncan*, 10 Ohio St. 181; *Port v. Port*, 70 Ill. 484. The opinion of Lord Stowell in the case of *Dalrymple v. Dalrymple*, to which we have alluded, is an admirable exposition of the law of informal marriages. It is a masterpiece of judicial eloquence and careful research.

⁵ For a case arising on an indictment against a man for cohabiting with a woman without formal marriage, but under a special contract for a life-union and joint accumulation of property and care of children, see *State v. Miller*, 23 Minn. 352. And see *Commonwealth v. Munson*, 127 Mass. 459. See further as to Presumptions of Marriage, *post*.

⁶ 26 Geo. II. c. 33 (1753).

This act required all marriages to be solemnized in due form in a parish church or public chapel, with previous publication of the banns; and marriages not so solemnized were pronounced void, unless dispensation should be granted by special license. Some harsh provisions of this act were relaxed in the reign of George IV., but soon re-enacted.¹ More recent legislation permits of a civil ceremonial before a register, to satisfy such as may have conscientious scruples against marriage in church.² Such, too, is the general tenor of legislation in this country; the law justly regarding civil observances and public registration sufficient for its own purposes, while human nature clings to the religious ceremonial.³

Either celebration before a clergyman or with the participation of some one of such civil officers as the statute may designate is therefore at the option of parties choosing at the present day to marry. This is the law of England and America. And the only controversies ever likely to occur in our courts would be where the language of the statutes in some particular State left it doubtful whether marriages celebrated informally were to be considered absolutely null. It is to be borne in mind that Lord Hardwicke's Act is of too recent a date to be considered as part of our common law. Was, then, marriage *in facie ecclesiæ* essential in England before the passage of this act? It is admitted that the religious marriage celebration was customary previous to the Reformation. It is further allowed that the church, centuries ago, created an impediment, now obsolete, called "precontract," the effect of which was that parties engaged to be married were bound by an indissoluble tie, so that either one could compel the other to submit at any time to the ceremonial marriage. But whether precontract rendered children legitimate, and carried dower, curtesy, and the other incidents of a valid marriage, is not clear. In 1844 the question, whether at the common law a marriage without religious

¹ 3 Geo. IV.; 4 Geo. IV. c. 76.

² See 2 Kent Com. 88-90; 1 Bish.

³ See 6 & 7 Will. IV. c. 85, & c. 88; Mar. & Div. 5th ed. § 279.

7 Will. IV., and 1 Vict. c. 22, and 3 &

4 Vict. c. 92.

ceremony was valid, went to the English House of Lords, and resulted in an equal division.¹ And, curiously enough, such was the fate of a similar case in this country before the highest tribunal in the land.² So that we may fairly consider the law on this point as for ever unsettled.³

Among most nations and in all ages has the celebration of marriage been attended with peculiar forms and ceremonies, which have partaken more or less of the religious character. Even the most barbarous tribes so treat it where they hold to the institution at all. The Greeks offered up a solemn sacrifice, and the bride was led in great pomp to her new home. In Rome, similar customs prevailed down to the time of Tiberius. Marriage, it is true, degenerated afterwards into a mere civil contract of the loosest description; parties being permitted to cohabit and separate with almost equal freedom.⁴ The early Christians, there is reason to suppose, treated marriage as a civil contract; yielding, perhaps, to the prevailing Roman law. Yet the teachings of the New Testament and church discipline gave peculiar solemnity to the relation. And religious observances must have prevailed at an early date, for in process of time marriage became a sacrament. In England, centuries later, it needed only Lord Hardwicke's Act to apply statute law to a universal practice; for although, in the time of Cromwell, justices of the peace were permitted to perform the ceremony, popular usage by no means sanc-

¹ Reg. v. Millis, 10 Cl. & F. 534.

² Jewell v. Jewell, 1 How. (U. S.) 219.

³ See full discussion of this question, with authorities, in note to 2 Kent Com. 87; also in 1 Bish. Mar. & Div. §§ 269-282; Cheney v. Arnold, 15 N. Y. 345. The American doctrine is, that the intervention of one in *holy orders* was not essential at common law. This is the view of Chancellor Kent, Judge Reeve, and Professor Greenleaf, as expressed in their respective text-books; also the general current of American decisions. Mr. Bishop confirms these conclusions while suggesting new reasons for such an American doctrine; as, for instance, that in these colonies the attendance

of one in *holy orders*, and more especially of an ordained clergyman of the established church, could not always be readily procured. See 1 Bish. Mar. & Div. 5th ed. §§ 279-282, and decisions collated; 2 Kent Com. 87; Reeve Dom. Rel. 195 *et seq.*; 2 Greenl. Ev. § 460.

But in several States the contrary is declared to be the common law. 1 Bish. *ib.* And statutory forms are declared requisite, and the doctrines of informal marriage denied more or less emphatically, as the foregoing pages have shown. *Supra*, § 31, note.

⁴ Smith's Dict. Antiq. "Marriage;" *supra*, Part I.

tioned the change. Informal marriages are uncommon even in Scotland, where the civil law prevails. In our own country it is not surprising that local jurisprudence should have exhibited some signs of reaction against ancient canon and kingly ordinance. Yet, even with us, the almost universal custom repudiates informal and civil observances; and, secured in the privilege of choosing prosaic and business-like methods of procedure, Christian America yields its testimony in favor of marriage *in facie ecclesie*.¹

§ 35. *The Same Subject.*— But, out of consideration for what may be termed the public, or natural and theoretical law of marriage, many American courts have, to a very liberal extent and beyond all stress of necessity, upheld the informal marriage against even legislative provisions for a formal celebration. Marriage being a matter of common right, it is lately held by the highest tribunal for harmonizing the rule of States, that, unless the local statute which prescribes regulations for the formal marriage ceremony positively directs that marriages not complying with its provisions shall be deemed void, the informal marriage by words of present promise must be pronounced valid, notwithstanding statutory directions have been disregarded.²

Whether we must absolutely accept this doctrine, or not, in its full pernicious extent, and thus put legislators to the use of express words of nullity in statutes which might otherwise as well have been omitted, the main purpose of enforcing upon civilized and populous communities marriage rites appropriate to so solemn an institution being surely desirable,

¹ See 2 Kent Com. 89, and authorities cited.

We do not mean to imply that marriage is a sacrament, or that religious ceremonies are essential to its due observance. We are speaking only of the universal testimony as to the fitness of peculiar and in general religious observances. Judge Reeve, exhibiting his contempt for "Popish" practices, says: "There is nothing in the nature of a marriage contract that is more sacred than that of other contracts, that requires the interposition of a person

in holy orders, or that it should be solemnized in church." Reeve Dom. Rel. 193. At the time he wrote, was not the practice prevailing in New England contrary to his theory, as it was before and as it remains still? And who has ever proposed in modern times to perform a business contract in church?

² *Meister v. Moore*, 98 U. S. 76, citing this as the rule in Michigan; *Hutchins v. Kimmell*, 31 Mich. 128; *Londonderry v. Chester*, 2 N. H. 268.

it will be readily conceded that English and American tribunals tend, in construing the marriage acts, to uphold every marriage, if possible, notwithstanding a non-compliance with the literal forms. And this is right; for while formal celebration is a shield to honest spouses and their posterity, rigor in the details of form, especially in inconvenient or trivial details, or those which it is incumbent rather upon third persons to respect, exposes them to new dangers. Thus, in construction of the English mandatory act, marriage celebrated by a clergyman in temporary quarters while the church was undergoing repairs is presumed to have been celebrated in a place duly licensed;¹ and as to the due proclamation of banns, collateral points concerning ecclesiastical authority are inappropriate.² Though the parties may have failed to observe certain formalities of license or registry, their marriage will generally be held good in both England and this country.³ Marriage before a large number of witnesses, such as cannot always be conveniently procured, is not to be readily insisted upon as indispensable under any statute.⁴ And where questions occur, as they do quite frequently, under penal statutes, which impose the exercise of discretion or of due formalities upon the minister or magistrate performing the ceremony, not only is such a person universally presumed to do rightly what he may be mulcted for doing wrongly, but his disregard of the penal prohibition will not invalidate the ceremony.⁵ The same may be said of public officers upon whom the duty is imposed of issuing a proper license to suitable parties desiring marriage;⁶ which license, as our local statutes frequently provide, the magistrate or min-

¹ *Queen v. Crosswell*, 1 Q. B. D. 446. And see *Stallwood v. Tredger*, 2 Philim. 287.

² *Hutton v. Harper*, 1 H. L. App. 464.

³ See *Sichel v. Lambert*, 15 C. B. x. s. 781; *Prowse v. Spurway*, 26 W. R. 116; *Cannon v. Alsbury*, 1 A. K. Marsh. 76; *Askew v. Dupree*, 30 Ga. 173; *Blackburn v. Crawfords*, 8 Wall. 175; *Holmes v. Holmes*, 6 La. 468; *Stevenson v. Gray*, 17 B. Monr. 193.

⁴ See *Rodebaugh v. Sanks*, 2 Watts. 9.

⁵ 1 Bish. Mar. & Div. 5th ed. §§ 283, 287, and cases cited; *Parton v. Hervey*, 1 Gray, 119; *State v. Robbins*, 6 Ire. 23; *Blackburn v. Crawfords*, 8 Wall. 175; *Pearson v. Howey*, 6 Halst. 12. This is the rule, even though one marries minors without the required consent of parents. *Parton v. Hervey*, *supra*.

⁶ *Ely v. Gammel*, 52 Ala. 584; *Mitchell v. Davis*, 58 Ala. 615; *Askew v. Dupree*, 30 Ga. 173. See § 36, *post*.

ister ought to require the parties to produce, before uniting them.

On the other hand, our ceremonial statutes of marriage, which require fulfilment at all, must, in fundamental respects, at all events, be complied with. Thus, the essence of formal marriage seems to consist in the performance of the ceremony by or in the presence of a responsible third person. And hence, unless parties can take refuge in natural law and an informal marriage, they are not permitted to tie their own knot. Consistently with this view, and quite rationally, it has been insisted in Massachusetts that husband and wife cannot be permitted to solemnize their own marriage. And quite recently in that State, where a ceremony was performed solely by the man and woman, no third person taking part, no magistrate or minister being present, and neither party claiming to hold the tenets of Friends or Quakers, it was held that a valid marriage rite had not been constituted.¹ We may assume, too, on general principle, that a mutual assent to marry in the presence of such third person is essential to the formal ceremony, and that if such assent is refused by either party, or waived or omitted altogether, there is no valid ceremony of marriage; while, as to the form, by words or acts, expressive of the marriage consent of the pair, this is discretionary, and no set formality or ritual is needful.² The English law insists pretty strictly upon the publication of banns, whereas in this country, where church and state are divorced, this formality is now quite generally dispensed with.³ The several States treat the marrying functions and jurisdiction of both ministers of the gospel and civil magistrates with great liberality, rarely permitting a marriage to be disturbed upon any misapprehension in these respects.⁴

§ 36. **Consent of Parents and Guardians.** — The consent of

¹ *Commonwealth v. Munson*, 127 Mass. 459. And see *Milford v. Worcester*, 7 Mass. 48. But in *Beamish v. Beamish*, 1 Jur. n. s. Part II. 455, it was held in Ireland that a clergyman might marry himself. See 1 Bish. § 289.

² *Wood, V. C.*, in *Harrod v. Harrod*, 1 Kay & J. 4, observes that in England it has never been held, as to the cere-

mony itself, that repetition of the words of the marriage service is necessary.

³ *Wood, V. C.*, *supra*; 1 Bish. § 292; *Cope v. Burt*, 1 Hag. Con. 434.

⁴ See 1 Bish. §§ 290, 291; *People v. Calder*, 30 Mich. 85. Questions of this character arise upon the interpretation of local statutes differently worded in different States.

parents and guardians is one of those formalities which marriage celebration acts now commonly prescribe in the interest of society, as they do banns or the procurement of a license generally for better publicity.

The consent of parents or guardians was not necessary to perfect a marriage at the common law. But Lord Hardwicke's Act made the marriage of minors void without such consent first obtained.¹ This proved intolerable. A *bona fide* and apparently regular marriage was in one instance set aside, after important rights had intervened, for no other cause than that an absent father, supposed to be dead, but turning up unexpectedly, had failed to bestow his permission, and the mother had acted in his stead.² Gretna Green marriages, on Scotch soil, became the usual recourse for children with unwilling protectors.³ Hence the law was afterwards modified, so that, without the requisite consent, marriages, although forbidden, might remain valid;⁴ and these features are found to characterize the marriage acts in the different states of this country.⁵ Clandestine marriages are doubtless to be discouraged, and the law will willingly inflict penalties upon clergymen, magistrates, and all others who aid the parties in their unwise conduct, the penalty serving in a measure as indemnification to the parent or guardian; but experience shows that legislation cannot safely interpose much farther.

Under such statutes (which, however, vary in language and scope in different States), it has been held that if a minor

¹ 26 Geo. II. c. 33. See 2 Kent Com. 85; *Rex v. Hodnett*, 1 T. R. 96; 1 Bish. Mar. & Div. 5th ed. §§ 293-295, and cases cited.

² *Hayes v. Watts*, 2 Phillim. 43.

³ Stat. 19 & 20 Vict. c. 96, to stop these runaway matches, enacts that no irregular marriage contracted in Scotland shall be valid unless one of the parties had his or her usual residence in Scotland, or lived there for 21 days preceding the marriage. *Lawford v. Davies*, 39 L. T. n. s. 111.

⁴ *Rex v. Birmingham*, 8 B. & C. 29; Bish. Mar. & Div. 309-322; Stat. 4 Geo. IV. c. 76.

⁵ 1 Bish. Mar. & Div. §§ 341-347,

and cases cited; *Smyth v. State*, 13 Ark. 606; *Wyckoff v. Boggs*, 2 Halst. 138; *Bollin v. Shiner*, 2 Jones (Pa.), 205. And see *Wood v. Adams*, 35 N. H. 32; *Kent v. State*, 8 Blackf. 163; *Askew v. Dupree*, 30 Ga. 173; *Fitzpatrick v. Fitzpatrick*, 6 Nev. 63; *Adams v. Cutright*, 53 Ill. 361; *State v. Dole*, 20 La. Ann. 378. The language of some statutes leaves the point in doubt as to whether marriages without the consent of parents renders the marriage void or only subjects offending parties, including the person who performs the ceremony, to a penalty. But the latter is, of course, to be presumed, rather than the former.

has both parent and guardian, the guardian should consent in preference;¹ though it might appear more proper to consider which has the actual care and government of the minor. One who has relinquished the parental control cannot sue for the penalty; but a father's unfitness is not pertinent to the issue of uniting his minor child in marriage without his leave,² nor ground for accepting the mother's sole consent instead.³ In this class of statutes, the minister or magistrate who has made himself amenable to the law cannot in general defend on the plea that he acted in good faith.⁴ The expression of consent is in some States made a prerequisite to granting the marriage license.⁵

§ 37. **Legalizing Defective Marriages; Legislative Marriage.**—Defective marriages have in some instances been legalized by statute; as where parties within the prohibited degrees of consanguinity or affinity have united. So with marriages before a person professing to be a clergyman or justice of the peace, but without actual authority. On principle, in fact, there seems no reason to doubt that any government, through its legislative branch, may unite a willing pair in matrimony, as well as pass general laws for that purpose.⁶ But though legislative divorces are not unfrequent, a legislative marriage is something unknown, not to say uncalled for. And in this country, questions of fundamental constraint under a written constitution might arise, even where the cure only of a defective marriage was sought by the legislature; inasmuch as the intervening rights of third persons might thereby be prejudiced.

§ 38. **Proof of Marriage; Presumptions.**—We now proceed to consider finally the difficult subject of proving a marriage.

¹ *Vaughn v. McQueen*, 9 Mo. 327.

² *Robinson v. English*, 10 Casey, 324.

³ *Ely v. Gammel*, 52 Ala. 584.

⁴ 1 Bish. § 342; *Sikes v. State*, 13 Ark. 696. But he may show due prudence on his part for faithfully ascertaining the age of the parties before uniting them, and so exculpate himself. *Gilbert v. Bone*, 79 Ill. 341. Some statutes make knowledge on the part of minister or magistrate the es-

sential ground of prosecution. *Bonker v. People*, 37 Mich. 4.

⁵ See *Fitzsimmons v. Buckley*, 59 Ala. 539.

⁶ *Brunswick v. Litchfield*, 2 Greenl. 28; *Moore v. Whittaker*, 2 Harring. 50; *Goshen v. Richmond*, 4 Allen, 458; 1 Bish. Mar. & Div. 5th ed. §§ 657-659. As to the effect of a Texas statute, which relaxed old requirements in legalizing an irregular marriage, see *Rice v. Rice*, 31 Tex. 174.

It is upon presumptions that marriage maintains a legal footing in many instances where actual proof would be difficult, if not impossible. Mr. Bishop states three presumptions in support of marriage, all of which have been incidentally suggested in the preceding sections: I. The presumption of innocence; II. The presumption that official persons have done their duty; III. The general presumption which favors marriage. The first two are of wide application, but the third is peculiar to the present subject.¹

I. The first presumption, that of innocence, we have seen supporting the informal marriage ceremony by words of present or future promise.² Very essential does it become to the latter; for there, the promise which is put in evidence relating only to the future, innocence, say the authorities, is presumed when copulation follows; or, in other words, the parties are supposed to have exchanged subsequently the requisite words of present promise, else copulation would not have taken place. A weak presumption surely, too favorable for human nature; and if, as at this day would be almost invariably the case in England and America, those words of future promise evidently related to the future celebration of a marriage in form, that presumption breaks down utterly.³ When a man and woman agree to marry hereafter, are they likely to mean that they will do no more than exchange vows equally private, when custom, statute, and common sense require that a minister or magistrate shall perform the ceremony and give it some publicity? If they do in populous localities, then the woman must be presumed weak either in chastity or in proper regard for the means of defending it.⁴

II. The second presumption, that official persons have done their duty, especially if penalties are imposed for the violation of that duty, supports the regularity of a ceremonial marriage in compliance with statute, and renders a simple record of marriage after the customary mode, or simple proof that the official person performed the ceremony, *prima facie*

¹ 1 Bish. Mar. & Div. 5th ed. §§ 432, 433.

² *Supra*, § 33, and cases cited; Peck v. Peck, 12 R. L. 485.

³ *Supra*, §§ 31-33.

⁴ See Breadalbane's Case, L. R. 1 H. L. Sc. 182.

evidence that in prerequisites and details all was performed rightly.¹

III. The third presumption is that the fact of marriage should be favored under all circumstances. *Semper præsuntur pro matrimonio* is the universal maxim of law. If, therefore, a marriage has once been shown, whether directly or by circumstantial evidence, the assumption must be that the marriage was legal and legally performed; and they who seek to prove otherwise have the burden of doing so. Lapse of time strengthens this presumption, which, being in the interest of offspring and of the stability of the marital relation, is in the interest of the public likewise.²

To apply, now, these combined presumptions for proving a marriage. Proof of actual marriage is rarely required, except in prosecutions for bigamy and actions for criminal conversation.³ In other instances a *prima facie* case is made out from cohabitation, reputation, admissions, conduct of the parties, and other like circumstances. For when man and woman live together with constancy as husband and wife, not visiting or receiving one another's visits merely, neither of them occupying apparently the station of menial, the presumption arises, all other things being equal, that they are married to one another.⁴ This presumption suffices for most controversies where the fact of marriage is put at issue, including questions of legitimacy, of a widow's right of inheritance and dower, and civil cases in general which involve property

¹ 1 Bish. §§ 450, 451; *supra*, §§ 35, 36; *People v. Calder*, 30 Mich. 85.

² 1 Bish. §§ 457-459; *Piers v. Piers*, 2 H. L. Cas. 231; *cases post*; *De Thoren v. Attorney-General*, 1 H. L. App. 686.

³ In the action for criminal conversation, and indictments for bigamy or polygamy, the issue tendered is that one of two cohabitations or acts of commerce is criminal, and the other innocent, and hence stricter proof is requisite than usual. Indictments for adultery, incest, &c., have also been held to require strict proof in a few instances. 1 Bish. § 442.

⁴ 1 Bish. Mar. & Div. 5th ed. § 487, *et seq.*, and *cases cited*; 2 Greenl. Ev.

§ 762; *Shand v. Gardiner*, 6 Eng. Ec. 68; *Cunninghams v. Cunninghams*, 2 Dow, 482; *Budington v. Munson*, 33 Conn. 481; *Holmes v. Holmes*, 6 La. 463; *Starr v. Peck*, 1 Hill (N. Y.), 270; *Miller v. White*, 80 Ill. 580; *Barnum v. Barnum*, 42 Md. 251; *Jackson v. State*, 8 Tex. App. 60; *Proctor v. Bigelow*, 38 Mich. 282; *Commonwealth v. Stump*, 53 Penn. St. 132; *Blasini v. Blasini*, 30 La. Ann. 1388; *Redgrave v. Redgrave*, 38 Md. 93; *Bowers v. Van Winkle*, 41 Ind. 432. Statutes sometimes give this presumption a still wider scope, extending it to all cases, civil or criminal. *State v. Armington*, 25 Minn. 29; Bish. § 544.

rights.¹ But cohabitation alone is not sufficient proof of marriage; there must appear a matrimonial cohabitation, and this justified by contemporaneous behavior of the parties, such as should furnish to society the reputation of marriage. Cohabitation and repute go together; and of so much importance does our law regard the judgment formed by acquaintances and kinsfolk on the point of marriage, from their opportunities of observation, that some authorities favor the idea that repute alone would be *prima facie* proof of marriage,² though in vindication of such repute the cohabitation upon which it is founded ought to be stated besides, that all evidence may be carefully weighed by court and jury as to the main fact of marriage.³ The declarations of parties, and other attendant circumstances of cohabitation, all of which are admissible, as part of the *res gestæ*, to show a virtuous intercourse between man and woman, must, together with the repute originating in consequence, be contemporaneous with that intercourse and not subsequent.⁴

With respect to the declarations of the parties themselves, their value depends chiefly upon the circumstances under which they were made; and reputation, favorable or unfavorable, is founded on general and not singular opinions, being the social verdict upon the pair, as one may say, and a verdict society rarely fails to give from its means of knowledge. Where reputation is found divided, or the cohabitation is partial and irregular, the virtue of the cohabitation is discredited at once, and the presumption of marriage fails unless strengthened by other means.⁵ Nor, after all, do cohabitation and repute afford more than a presumption of marriage; direct evidence that no marriage had been contracted, or even that the man cohabited with two women at the same time, would destroy the inference of virtue; and in every case the presumption of virtue and lawful marriage may be rebutted.⁶

¹ 1 Bish. §§ 443-449.

² Fleming v. Fleming, 4 Bing. 266; 1 Bish. § 438, and cases cited.

³ 1 Greenl. Ev. § 107; 1 Bish. § 438, 440.

⁴ Taylor, in re, 9 Paige, 611, per Chancellor Walworth.

⁵ See Barnum v. Barnum, 42 Md. 251; 1 Bish. § 440; Yardley's Estate, 75 Penn. St. 207.

⁶ 1 Bish. § 440; Goldbeck v. Goldbeck, 3 C. E. Green, 42; Port v. Port, 70 Ill. 484.

In Jones v. Jones, 45 Md. 144; s. c.

The presumption in favor of decency and virtue may be overcome, therefore, by counter-presumption. And as a cohabitation illicitly begun is presumed to so continue until proof of change, a marriage will not, in England or most parts of the United States, be presumed from such cohabitation and repute, unless something open and unequivocal, like a legal marriage ceremony, upon fit opportunity, puts both parties in a virtuous relation.¹ But States and countries, if there be such, which favor informal marriage, instead of requiring ceremonies, might show, by way of presumption, more favor in this respect.² If a particular marriage celebration is set up to overcome the unfavorable presumption arising from illicit connection, that particular marriage should be proved.³

General repute in a family, proved by surviving members of it, is admissible upon a question of marriage or pedigree.⁴ And it is said that a marriage may be established upon the preponderance of repute, although there be repute against the reputed marriage as well as for it.⁵

The legitimacy of children is strongly favored in the application of these presumptions, and for their sake even more than their parents. As a matter of proof, a child born in wedlock is taken to be the lawful offspring of the pair, even though the mother were living in adultery at the time of the conception, provided the husband had intercourse with her at

48 Md. 391, it is held, in the case of colored people, that the presumption of a previous marriage from cohabitation and repute is at once overthrown when one of the parties is shown to have married, subsequently, another person in due form while the other party is living. But compare *Blanchard v. Lambert*, 48 Iowa, 228, which presumes rather that a divorce has been procured.

Even though a marriage ceremony with A. be proved on B.'s part, it may be overcome by proof that B. had a prior spouse still living. *Emerson v. Shaw*, 56 N. H. 418.

¹ See *Floyd v. Calvert*, 58 Miss. 37;

Duncan v. Duncan, 10 Ohio St. 181; *Barnum v. Barnum*, 42 Md. 251; *supra*, § 81.

² See *Breadalbane's Case*, L. R. 1 H. L. Sc. 182; 1 Bish. §§ 503-517, where the subject is discussed with some bias in this direction. In *Collins v. Collins*, 80 N. Y. 1, even where marriage under a disability was believed by the woman to be lawful, cohabitation subsequent to the removal of the disability, and in reliance simply upon the void marriage, was held insufficient.

³ *Barnum v. Barnum*, 42 Md. 251.

⁴ *Id.*

⁵ *Lyle v. Ellwood*, L. R. 19 Eq. 98.

the time, or perhaps only access; and whatever the moral probabilities of such a case, neither husband nor wife can testify as to non-access, nor will evidence of unlawful paternity, except the strongest and most conclusive, be allowed to disturb the legal presumption so essential to an innocent child's welfare.¹ "The presumption thus established by law," observes Lord Langdale, "is not to be rebutted by circumstances which only create doubt and suspicion; but it may be wholly removed by proper and sufficient evidence."² While, however, a wife cannot, by her evidence, bastardize her own offspring, she is permitted, from the necessity of the case, to prove criminal conversation with a third person, a point collateral to legitimacy and matrimonial access.³ The presumption is that a child born after the nuptials, of which the mother was pregnant at the time, is the child of the married pair; but, as we have shown, fraud upon an innocent partner may be established instead, by a birth following scandalously soon upon the ceremony, and may afford him ground for seeking to annul the marriage.⁴ Proof of cohabitation, however, unaccompanied by reputation of marriage, will not raise a presumption in favor of the legitimacy of offspring.⁵

IV. A fourth presumption, that of life, is mentioned in the books, which affects the issue of bigamy, and counteracts to some extent the effect of the three presumptions already considered. The general rule of law is that where a person — as, for instance, one of the marriage parties — is absent and not heard from during seven years, death should be presumed, but that meantime the presumption is that the life continues. Such presumption is not, however, conclusive; nor can it be said after seven years that the person lived during that whole period, or died at any intermediate date

¹ *Hargrave v. Hargrave*, 9 Beav. 552; *Phillips v. Allen*, 2 Allen, 458; 1 Bish. §§ 447-449, and cases cited; *De Thoren v. Attorney-General*, 1 H. L. App. 686. But see *Cannon v. Cannon*, 7 Humph. 410.

² *Hargrave v. Hargrave*, 9 Beav. 552, 555. That is to say, by evidence of incompetence on the husband's part, absence at the time of conception, &c.

³ *Rex v. Reading*, Cas. temp. Hardw. 79; *Patchett v. Holgate*, 15 Jur. 308. On an indictment for adultery, the *particeps criminis* cannot prove the marriage by her testimony. *State v. Bowe*, 61 Me. 171.

⁴ *Best Ev.* 2d ed. 417; 1 Bish. § 548; *supra*, § 28.

⁵ *Cargile v. Wood*, 68 Mo. 501; *Foster v. Hawley*, 15 N. Y. Supr. 68.

in particular. Circumstances may favor the idea that death occurred much sooner, or much later, or not at all; and, after all, this presumption is chiefly for legal convenience, and to fix the standard of innocence; for should the missing person eventually prove alive, the new marriage or the administration founded upon an erroneous supposition of death falls to the ground.¹

§ 89. *Proof of Marriage in Fact.*—More satisfactory than presumptions, which may always be rebutted, and in some cases, as we have seen, are quite insufficient, is the proof of a marriage in fact over and above presumptions. Record proof of a marriage celebration is always appropriate where the fact itself is at issue. In England, and probably all of the United States, the law requires marriages to be registered by the proper officer; parish church records being the more common in England, and town or civil records in America. These records are of great value as testimony, not necessarily because of the incidental signatures of parties, but because these are public records, kept in a public place, under authority of the law.² Whether the issue be civil or criminal, the record-book may be offered in evidence, or a certificate of the particular record by the officer having custody of the book; or once more, any third person, competent to be sworn as a witness, may, under the sanction of his oath, verify the extract of a particular record made by himself.³ But nothing more is thus proved than the facts which ought to be entered in the register, and the testimony may be contradicted or shown to be a forgery or unauthorized entry.⁴ A sort of certificate, distinct from this public record of marriage, is that which is signed by a clergyman or justice of the peace, who purports to have solemnized the marriage; an instrument not admissible as evidence *per se*, according to the better class of cases,

¹ 1 Bish. §§ 452-456; *supra*, § 25; Gorman v. State, 23 Tex. 646; Hull v. Rawls, 27 Miss. 471; Reg. v. Lumley, L. R. 1 C. C. 196.

² 1 Bish. Mar. & Div. 5th ed. §§ 460-469, and cases cited; 1 Salk. 281; Rice v. State, 7 Humph. 14; Woods v. Woods, 2 Curt. Ec. 516.

³ 1 Greenl. Ev. § 488; 1 Bish. §§ 461, 468.

⁴ *Id.* See State v. Colby, 51 Vt. 291, where the mere record of the town clerk, who could not authenticate the minister's return to him, was discredited.

and yet, in connection with testimony upon oath, establishing a marriage in fact, and, more particularly when shown to have been given contemporaneously with the marriage, a valuable piece of testimony.¹ And akin to such unofficial certificates are the memoranda which, independently of statute requirements, an officiating minister or magistrate has been in the habit of keeping, and which appear to be favorably treated when produced from the proper custody;² also the entries in a family Bible, which, if long accessible to members of a family, may carry the weight of family admissions.³

A marriage certificate, or record, or certificate of record, shows only that two persons bearing the names mentioned, were united at the time and place specified; and hence the identity of those names with the persons whose marriage in fact is at issue, remains to be established by other proof, circumstantial being in general sufficient for that purpose.⁴

Circumstantial evidence may establish the fact of marriage. Thus, the admissions of either or both parties, or the public acknowledgment by one of the other, as a spouse, may be shown in the case of a clandestine marriage or under circumstances which render it difficult or impossible to adduce more direct testimony.⁵ But proof of marriage in fact being needful at the outset, wherever better testimony is accessible, its production ought to be required. Deliberate admissions of marriage by one party are strong evidence against that party, and in civil cases where the other seeks to establish the fact. But admissions, and indirect testimony in general, seem unfavorably regarded in indictments for bigamy, and perhaps in actions for criminal conversation besides; presumptions,

¹ *Nokes v. Milward*, 2 Add. Ec. 886; *Hill v. Hill*, 8 Casey, 511. In 1 Bish. §§ 471-473, the growth of a practice in some States, of permitting the unsworn certificate of the magistrate or minister to be shown in evidence, is noted; also statutes which elsewhere enhance the value of such testimony.

² *Blackburn v. Crawford*, 8 Wall. 175; *Kennedy v. Doyle*, 10 Allen, 161; *Hubbard v. Lee*, L. R. 1 Ex. 256; *Clark v. St. James' Church*, 21 Hun, 95.

³ *Weaver v. Leiman*, 52 Md. 708; 1 Taylor Ev. § 585.

⁴ 1 Bish. §§ 479-481; *Birt v. Barlow*, 1 Doug. 171; *Wedgwood's Case*, 1 Greenl. 75; *Commonwealth v. Norcross*, 9 Mass. 492.

⁵ See *Maxwell v. Maxwell*, Milw. 290; 1 Bish. §§ 487, 488. What is called the establishment of marriage by habit and repute, considered *ante*, is closely allied to this sort of proof.

as we have seen, being here deemed insufficient proof of the fact, and strong extraneous proof being desired when the issue is so sternly presented against a defendant;¹ though the course favored by several cases and by Mr. Bishop is to weigh the confession or admission by the light of circumstances, and not exclude it utterly.²

Direct proof of the marriage, other than by the record, is perhaps the most satisfactory of all. The fact may be established by the clergyman or magistrate who solemnized the marriage; or by any third person who was present at the ceremony.³ Where not rendered incompetent by the usual rules of evidence, as parties interested, parties to the record, and the like, the persons alleged to have been married may give their own testimony on that point; but to examine the question of competency in such cases is foreign to our present purpose.⁴ As for the clergyman or magistrate who performed the marriage, proof of official character is not requisite; for it is enough that he be a clergyman or magistrate *de facto*, and in the habit of performing the ceremony.⁵

CHAPTER II.

PROMISES TO MARRY.

§ 40. **Common-Law Action for Breach of Promise.**—The action for breach of promise to marry applies the most prosaic of remedies to the most sentimental and romantic of com-

¹ 1 East P. C. 471; *People v. Humphrey*, 7 Johns. 314; *State v. Roswell*, 6 Conn. 446; *People v. Lambert*, 5 Mich. 349. See *Morris v. Miller*, 4 Burr. 2057, commented upon, 1 Bish. § 490.

² 1 Bish. Mar. & Div. §§ 497-502; *State v. Roswell*, 6 Conn. 446; *Wolverton v. State*, 16 Ohio, 173; *Peppinger v. Low*, 1 Halst. 884; *Forney v. Hallacher*, 8 S. & R. 159.

³ *Commonwealth v. Norcross*, 9

Mass. 492; *Bruce v. Burke*, 2 Add. Ec. 471; *Patterson v. Gaines*, 6 How. (U. S.) 550; 1 Bish. Mar. & Div. 5th ed. §§ 494-496, and cases cited.

⁴ 1 Bish. § 494; 1 Greenl. Ev. § 342; *State v. Wilson*, 22 Iowa, 364; *Allen v. Hall*, 2 Nott & McC. 114.

⁵ 1 Bish. § 495; *Reg. v. Millis*, 10 Cl. & F. 534, 861; *State v. Robbins*, 6 Ire. 28; *State v. Winkley*, 14 N. H. 480; *State v. Abbey*, 29 Vt. 60.

plaints. The ashes are weighed on the cold altar after the sacred flame has gone out. Tender confidences, whispered protestations, the passionate phrase of love-letters, all those mysterious signs and symbols which love dotes upon, are carefully put together by twelve plain jurymen to establish a transaction, as though the wooing of a human heart were like bargaining for a pair of lungs. The consolation afforded to the afflicted suitor by the common law is that of pecuniary damages, on the principle that the other party has failed to fulfil the bargain.

As the promise to marry is intimately connected with that of marriage, though treated usually in text-books upon the law of contracts only, we may be permitted to set before the reader the main principles pertaining to the subject, with especial reference to the remedies for a breach. The subdivisions of this chapter are as follows: I. Foundation of the Right of Action. II. Parties to the Promise and the Action. III. What constitutes the Promise to marry. IV. Promises to marry as affected by the Statute of Frauds. V. At what time a Promise to marry may be regarded as broken. VI. Rescission of a Contract to marry. VII. When Promises to marry are against Public Policy. VIII. General Defences to the Action for Breach of Promise. IX. Rule of Damages; Miscellaneous Points of Practice. X. Concluding Observations upon the Action for Breach of Promise.

§ 41. I. *Foundation of the Right of Action.* — A contract to marry must be clearly distinguished from the marriage contract, or marriage institution, which, as we have seen, rests upon solemn foundations of its own. Promises to marry have been treated by the common law from the earliest times on the general footing of agreements. Policy forbids, of course, that specific performance of such a contract be enforced in equity or treated at this day as a “precontract” or species of marriage.¹ But for breach of the promise an action would always lie for damages at the common law, as in other cases of *assumpsit*; though in aggravated cases we shall find damages assessed somewhat after the manner of a tort.

¹ *Cheney v. Arnold*, 15 N. Y. 345; *supra*, § 34.

In the early reports, nevertheless, doubts were entertained as to the jurisdiction of common-law courts in such suits; and this, because the contract to marry was so nearly allied with marriage, while marriage from the time of Pope Alexander III., or the latter part of the twelfth century, was, in England, a matter for the cognizance of spiritual or ecclesiastical courts only. A motion to arrest judgment where the plaintiff had a verdict was argued on this ground in *Holcroft v. Dickenson*,¹ in 25 Car. II., but three of the four judges (Chief Justice Vaughan dissenting) pronounced in favor of the plaintiff.

This historical uncertainty concerning the practice of bringing the common-law action in common-law courts was adverted to in a recent Indiana case,² where counsel for the defence made the very ingenious argument that at the first settlement of the United States there was no such common-law right of action at all. *Stretcher v. Parker*,³ decided in 1639, was, as counsel contended, the earliest breach of promise case ever maintained in England in a common-law court. Admitting all this, however,⁴ the question in Coke's day was one of jurisdiction local to England, and the doubt did not touch the right of action at all. "Indeed," observes Worden, J., "the principle which upholds such action is as old as the principle which gives damages in any case for the breach of a contract. And it is immaterial whether any case can be found in England prior to 1607, in which such action has been maintained."⁵

§ 42. II. *Parties to the Promise and the Action.*—In practice, it is found that the suit for breach of promise is almost exclusively a woman's weapon; not, we may imagine, because those light perfidies are wholly on the man's part, nor necessarily because, when injured, he feels his humiliation less, but rather on account of sexual differences of temperament and disposition, affecting the methods of resentment. If the

¹ Carter, 233. See, upon the subject of English ecclesiastical courts and common law of marriage and divorce in the United States, 1 Bish. Mar. & Div. §§ 48-86.

² *Short v. Stotts*, 58 Ind. 29.

³ 1 Rolle Abr. 22.

⁴ Authorities, including the Year Books, cited by Ellis, J., and others, in *Holcroft v. Dickenson*, Carter, 233, indicate that there were cases earlier than *Stretcher v. Parker*.

⁵ 58 Ind. 29, 35.

promise to marry does not bind one of two adults, neither, on principle, ought it to bind the other; the consent is in fact reciprocal and obligatory;¹ and hence the right to sue for breach is against the party who breaks the promise, of whichever sex this may be. *Harrison v. Cage* is an English case of William III.'s time, where the discarded lover actually sued his false mistress, and won a verdict; and this strange reversal of the sexes in the face of justice did not deter the court from declaring unanimously that the plaintiff was entitled to judgment.²

The usual contract rules apply as to the competency of parties. A lunatic's promise to marry would not bind that party. Nor does a minor's, unless the minor ratifies the engagement on reaching majority. And here we may observe that the age at which a marriage binds a male or female is one thing, and the age of majority for the marriage promise another, the considerations of policy applying quite differently.³ A late English statute requires more than a ratification, to wit, a new and distinct contract, in order to bind an infant on his promise after he has come of age; and this statute covers promises to marry.⁴

An action for breach of promise to marry will not lie against the personal representative of a deceased promisor, where no special damages are alleged and proved;⁵ a rule which might seem to regard the tortious rather than contract aspect of such suits, whereby the breach becomes a personal injury, but which, perhaps, aims rather to make death good cause for non-fulfilment, regardless of damage to the other party.⁶

¹ 2 Chitty Contr. 789, Perkins' notes; *Wightman v. Coates*, 15 Mass. 5.

² *Harrison v. Cage*, 12 Mod. 214. And see *Baddeley v. Mortlock*, Holt N. P. 151.

³ See *Reish v. Thompson*, 55 Ind. 34; *Leichtweiss v. Treskow*, 21 Hun, 487; *Frost v. Vought*, 37 Mich. 65.

⁴ *Ditcham v. Worrall*, L. R. 5 C. P. 410. Here, however, the court inferred a new promise from three years' recognition of the engagement formed by the defendant during his minority, and

his asking the plaintiff to name the day. And see *Northcote v. Doughty*, 4 C. P. D. 385. It would appear that an infant may sue an adult for such breach. Chitty Contr. 790; 2 Str. 973; *Willard v. Stone*, 7 Cow. 22.

As to the breach of promise by one incurably impotent, see *Gulick v. Gulick*, 41 N. J. L. 13.

⁵ *Smith v. Sherman*, 4 Cush. 406; *Grubb v. Sult*, 82 Gratt. 203; *Wade v. Kalbfleisch*, 58 N. Y. 282.

⁶ *Shuler v. Millsaps*, 71 N. C. 297,

§ 43. III. What constitutes the Promise to marry.— The general principles which underlie the whole law of contract must determine when and in what manner parties become bound to this most solemn of mutually dissoluble contracts. The practical difficulties are these: sexual fascination, not to add a common recognition of the very solemnity of such affairs, will draw a light-minded person very close to a promise who does not intend one; even with the serious the disposition is to leave more to inference than plain expression; and, moreover, mere favors and attentions on the one hand, or, on the other, deliberate arrangements between man and woman for dalliance and loose companionship, by no means amount to promises to marry.

If a man seriously and directly asks a woman to marry him, and she accepts with equal seriousness and directness, the case is a clear one of promise to marry; and the more so, if these proposals have passed in writing. But doubts must arise where, as so often happens, circumstances less positive are relied upon to establish the engagement; and there might have been mere coquetry, flirtation, loose jest, or criminal purpose instead.

Some mutual contract to marry is requisite in order that one may sustain an action for breach of promise. But no particular form of words can be pronounced essential. It is sufficient if such language were used as to show that in fact the minds of the parties met.¹ And while the mutual intention should be serious and honorable, serious and honorable intention may be presumed in any case from acts and declarations justifying that inference; for where one so conducts as to induce the other to believe there is an engagement between them, and to act accordingly, and yet, after knowing that impression is produced, keeps on in the same tenor, such party, it is said, cannot set up a light or jesting purpose afterwards, or deny that the engagement in fact existed.²

rules, for one State at least, that the action for breach of promise does not abate on account of the defendant's death.

¹ *Homan v. Earle*, 58 N. Y. 267; *Ellis v. Guggenheim*, 20 Penn. St. 287.

² 58 N. Y. 267. And see *Wightman v. Coates*, 15 Mass. 5; *Southard v. Rexford*, 6 Cow. 254; *Honeyman v. Campbell*, 2 Dow & Cl. 282; 2 Chitty Contr. 790; *Harvey v. Johnston*, 6 C. B. 296.

But as to the evidence of a contract to marry, more direct proof is now commonly required than formerly, since modern statutes permit parties themselves to take the stand, and tell their own story. While the old rule prevailed, excluding such interested witnesses, the contract was sometimes inferred from proof rather of such circumstances as usually attend an engagement. "This rule," observes Chief Justice Church, "permitted an implication, from what was proved, of a contract not proved."¹ Whatever the expression of earlier cases, then, a promise to marry cannot commonly be inferred alone at this day from one's devoted attention, frequent visits, and apparently exclusive attachment.² Nor from mere presents or letters, not to the point.³ Nor from the plaintiff's sole announcements to friends, or her wedding preparations without the defendant's knowledge.⁴ Nor from what the man's mother or father may have said to the woman without his knowledge, and *vice versa*.⁵ Nor from the woman's unexplained possession of an engagement ring.⁶ Neither a mere courtship, nor even an intention to marry, can constitute, *per se*, a contract to marry.⁷

But the giving and accepting of an engagement ring, if properly shown, becomes a most important circumstance. And the understanding of a marriage intention having been once elicited from pertinent words, acts, or conduct of the parties to this transaction (for a formal interchange of promises is not necessary), we may find their courtship, their correspondence, the presents which passed between them, admissions by the defendant, and the like, all material in their bearing upon the main conclusion, and still more material for fixing the amount of damages to be awarded in the suit.⁸

¹ *Homan v. Earle*, 53 N. Y. 267, 271. *Walmsley v. Robinson*, 63 Ill. 41; *Russell v. Cowles*, 15 Gray, 582; *Graham v. Martin*, 64 Ind. 567.
² *Homan v. Earle*, 53 N. Y. 267; *Walmsley v. Robinson*, 63 Ill. 41; *Burnham v. Cornwell*, 16 B. Mon. 284.
³ See *Commonwealth v. Walton*, 2 Brews. 487.
⁴ *Homan v. Earle*, 53 N. Y. 267.
⁵ See *Bessela v. Stern*, L. R. 2 C. P. D. 265; *Pape v. Lister*, L. R. 6 Q. B. 242; *Wetmore v. Mell*, 1 Ohio St. 26; *Moritz v. Mellhorn*, 13 Penn. St. 331; *Cates v. McKinney*, 48 Ind. 502; *Lahey v. Knott*, 8 Oreg. 198.

⁶ *Lawrence v. Cooke*, 56 Me. 187.
⁷ *Commonwealth v. Walton*, 2 Brews. 487.
⁸ See *Bessela v. Stern*, L. R. 2 C. P. D. 265; *Pape v. Lister*, L. R. 6 Q. B. 242; *Wetmore v. Mell*, 1 Ohio St. 26; *Moritz v. Mellhorn*, 13 Penn. St. 331; *Cates v. McKinney*, 48 Ind. 502; *Lahey v. Knott*, 8 Oreg. 198.

While mutual consent is understood to be at the foundation of the contract to marry, our law makes full allowance for the difference of sex. Logically speaking, either party might propose or accept; but it has been considered in the most enlightened ages the man's place to take the initiative and make the offer; the woman being the more passive of the two.¹ And, in general, where a promise is proved on the part of the man, evidence showing that the woman demeans herself afterwards as if concurring in the engagement will be liberally construed, though not by itself, perhaps, so conclusively establishing an acceptance as formerly, for the reasons we have already stated.²

*Homan v. Earle*³ is an important illustration of our general principle, both because of Chief Justice Church's lucid exposition of the law and the delicate shading of the facts. Here a woman, evidently without reproach, had been led into a marriage engagement by a man whose conduct seems to have been purposely ambiguous. As the court observed, both parties to the suit were highly respectable, belonging to the same church; equals, except in pecuniary resources; the plaintiff about thirty, and the defendant, fifty. The defendant, left a widower, began his visits soon after the death of his first wife, to the plaintiff, who had been her intimate friend. His visits grew longer and more frequent; there were rides and walks, caresses, and the usual endearing words. He gave the woman to understand that his wife had said something in her favor before she died. He spoke significantly of intending to marry when the year was out, of taking a wife of a certain description which she answered, of expecting her to know some day all his business. She cautioned him, after he had gone on in this way for two months, that she considered this meant a great deal, and at the same time she offered him his freedom. This warning only made him press his suit the more ardently, though he was far from making himself explicit. But, coming to her after a few days'

¹ This principle is applied at common law to the tender which precedes the present action for damages, when the woman is plaintiff. *Post*, § 45.

² 8 Salk. 16, 64; *Daniel v. Bowles*, 8 C. & P. 553; *Ellis v. Guggenheim*, 20 Penn. St. 287.

³ 53 N. Y. 267.

absence, he made, as she testified, a formal declaration of love, which she reciprocated. The two were then separated for six weeks, after which the visits went on, during a brief season, much as before. By this time, however, a curious proceeding on the man's part leaves us to infer that he had begun courting another woman, with whom he had lately become acquainted, and whom, in fact, he married about six months afterwards. Drafting a letter one day with his own hand, to the effect that the plaintiff regarded his visits as evidence of friendship, and "nothing more," he persuaded her to copy and sign it. He wished this, he told her, because he did not want others to think they had any understanding together so soon after his wife's death. The defendant's conduct, when his new engagement came out, indicated that he was conscious of having wronged the plaintiff. The court refused to disturb a verdict rendered for the woman on these facts; notwithstanding "negative evidence," such as the absence of presents, a ring, letters, and definite plans of marriage.

§ 44. IV. Promises to marry as affected by the Statute of Frauds. — Treating promises to marry like all other contracts, we find old authorities assuming that where the contract is not to be performed within a year, it is void under the Statute of Frauds, unless expressed in writing. Thus, if A. in January, 1880, promises to marry B. in February, 1881, B. cannot feel sure that the engagement binds, unless the promise is put in black and white.¹

But the latest cases incline to construe the statute so as not to affect promises to marry, but promises in consideration of marriage, such as marriage settlements.² Where A. promises to marry B. within thirteen months, two years, &c., such a promise does not come under the statute at all, for it is capable of being performed within a year, and that is enough.³ An agreement to marry may commonly be re-

¹ 2 Parsons Contracts, 64; Browne Statute Frauds, § 215; Short v. Stotts, 58 Ind. 29; Derby v. Phelps, 2 N. H. 515. But see Nichols v. Weaver, 7 Kan. 873.

² Lawrence v. Cooke, 56 Me. 187;

Paris v. Strong, 51 Ind. 389; Browne Statute Frauds, § 215; Clarke v. Pendleton, 20 Conn. 495.

³ See Blackburn v. Mann, 85 Ill. 222.

garded as a continuing contract by mutual consent, and hence unaffected by the statute.

§ 45. V. At what Time a Promise to marry may be regarded as broken.—If a person engaged to marry B. marries C. instead, such party puts it out of his or her power to fulfil the former engagement, and B. may sue at once for breach of promise.¹ If, again, the wedding with B. was set for a certain day, and A. inexcusably fails to appear, B., who was ready, may treat the contract as broken. And modern precedents, moreover, both in England and the United States, favor the rule that a breach of contract arises upon a positive refusal to perform, although the time specified for performance has not yet arrived. Hence, where parties had engaged to marry "in the fall," fixing no day, and the man in October announced his determination not to perform the contract, it was held that the woman might bring her action immediately.²

An engagement binds, even though no precise time be fixed for the marriage; for here the law presumes that a reasonable time shall elapse. And the reasonable time having elapsed, and one party inexcusably neglecting or refusing to fulfil the engagement, while the other requests marriage, and alleges readiness, the latter is amply justified in breaking off the match, and likewise, as it would appear, in suing the delinquent party.³ The declaration ought in strictness to aver according to the promise; where the promise was conditional, or to marry within a certain period or at a certain date, the allegation and proof should be accordingly;⁴ and if to marry within a reasonable time or on request, the declaration should correspond.⁵ But courts are not always strict as to pleadings and proof in this respect.⁶

¹ *Sheahan v. Barry*, 27 Mich. 217; *Greenup v. Stoker*, 3 Gil. 202; *Bennett v. Beam*, 42 Mich. 346.

² *Burtis v. Thompson*, 42 N. Y. 246.

And see *Holloway v. Griffith*, 82 Iowa, 409; *Frost v. Knight*, L. R. 7 Ex. 111; *Gough v. Farr*, 8 C. & P. 631.

³ *Clements v. Moore*, 11 Ala. 85;

Chitty Contr. 791; *Potter v. Deboos*,

1 Stark. 82, per Lord Ellenborough;

⁴ *Chitty Contr.* 791; *Clark v. Pendleton*, 20 Conn. 495; *Peake*, Add. C. 103.

⁵ *Chitty Contr.* 791; *Caines v. Smith*, 15 M. & W. 189.

⁶ See *Bennett v. Beam*, 42 Mich.

346; *Hunter v. Hatfield*, 68 Ind. 416.

On principle, however, some tender should precede all such common-law suits; and the plaintiff (due allowance being made for the natural modesty of the sex) ought to allege and prove an offer and refusal. Readiness, however, is held to be enough on a woman's part, since it is for the man *ducere uxorem*.¹ And where the defendant has incapacitated himself from fulfilment by marrying another, such allegation of request may be dispensed with.²

§ 46. VI. *Rescission of a Contract to marry.* — A mutual release from a marriage engagement is the true way for parties to get rid of it; they who enter into such a promise mutually have mutually the power to rescind. But such a release must have been fairly and honorably procured in order to avail the party who sets it up.³ The man or woman who breaks off an engagement discharges the other party; but the latter has the option of treating this as a breach, and making it the foundation of a suit for damages. Release of the promise, like the promise itself, may usually be by word of mouth.⁴

§ 47. VII. *When Promises to marry are against Public Policy.* — If there is any one thing that a woman clearly understands, it is that a man who is already married is not at liberty to take her to wife. The thought of making a marriage under such circumstances is a moral sin, while the passionate compact to do so when opportunity shall occur not only places the promising parties in a most perilous relation towards one another, but doubly exposes the conjugal party, whose rights obstruct their inclination, to wanton and wicked sacrifice. And yet so blind is jealousy or the guilty passion that we find woman quite recently, in two States, fighting her way to the tribunal of last resort for the purpose of compelling a fickle man to pay damages, who had agreed, when married, to marry the plaintiff as soon as death or divorce should rid him of his wife. It is well that in both these States — New Jersey and

¹ *Cole v. Holliday*, 4 Mo. App. 99; *King v. Gillett*, 7 M. & W. 55; *Shellen-Graham v. Martin*, 64 Ind. 567; *Clem-barger v. Blake*, 67 Ind. 75. See *Grant v. Moore*, 11 Ala. 35.

² *Chitty Contr.* 791.

³ *Homan v. Earle*, 58 N. Y. 267;

⁴ See *Dean v. Skiff*, 128 Mass. 174.

Illinois — the agreement was pronounced contrary to public policy and void.¹

But guilty complicity is what excludes the plaintiff; and hence one may doubtless sue for breach of promise if ignorant at the time of the engagement that the defendant was already married.² In Tennessee this reservation has been indulged to a grave latitude. A married man courted a young woman who supposed him single, offering himself by letter. She accepted in form; whereupon he confided to her at once in his next epistle that he had a wife then living, from whom he expected to procure a divorce on getting certain papers passed. Instead of repudiating the contract, inquiring into the affair for herself, or keeping in reserve, as a woman should, she encouraged his love, pressing him fervently to hurry up those papers. He could not procure the divorce, because he had no grounds for one; and then she sued him for his breach of promise. The plaintiff was an intelligent and well-educated person. And yet it was held that, not being *in pari delicto*, she could maintain her action upon the offer she had accepted while supposing him single; and that her subsequent knowledge of his marriage could only be set up in diminution of damages.³

No action can be maintained for breach of a promise of marriage made in consideration of illicit sexual intercourse between the parties,⁴ a case which must be distinguished from that of seduction after promises have been interchanged. Nor can a mutual promise of incestuous or bigamous marriage be sued upon.⁵

§ 48. VIII. General Defences to an Action for Breach of Promise. — The preceding sections suggest the general bearing of defences applicable to the action for breach of promise. Perhaps, by way of amplifying what we have said concerning public policy, something may be added as to certain other

¹ *Noice v. Brown*, 38 N. J. L. 228; 39 N. J. L. 133; *Paddock v. Robinson*, 63 Ill. 99. to marry upon the event of a certain parent's death. *Frost v. Knight*, L. R. 7 Ex. 111.

² *Kelley v. Riley*, 106 Mass. 339; *Wild v. Harris*, 7 C. B. 999.

³ *Coover v. Davenport*, 1 Helsk. 368. *Semble* that in England one can promise

⁴ *Steinfeld v. Levy*, 16 Abb. N. Y. Pr. 26; *Hanks v. Naglee*, 54 Cal. 51.

⁵ *Chitty*, 793; 1 Ld. Raym. 386.

grounds upon which a defendant has sought to exculpate himself. Notwithstanding, it is said, certain old dicta (as to a man's having an abscess on his breast, &c.), the better opinion would seem to be that no infirmity, bodily or mental, which may supervene or be discovered after the making of a contract to marry — unless it be incapacity on the part of the man, or want of chastity on the part of the woman — can be relied upon by either as a ground for refusing to perform the contract.¹ This statement may be correct as far as it goes, but does not cover the whole ground. Our last section has shown us that, with reference to a contract vicious or incapable of performance, public policy regards the present action differently, according to blame, according to the innocence or guilty complicity of one or the other party interested; in other words, that one who unwisely or wrongly promises marriage is not absolved from the necessity of responding in damages to the innocent party who suffers in consequence of the breach. On the other hand we may fairly assume that if the marriage honestly promised by the defendant proves impossible or contrary to good morals because of the other's sole fault, it is he rather than the other who ought to sue, and he cannot be held liable for the breach. And, lastly, if the promise be vicious on both sides, — as where the contract is in mutual consideration of sexual intercourse or mutual reliance upon the death of some existing wife or husband, — the vice taints both parties, and neither has a standing in the courts.

Hence, we apprehend, physical incapacity on the part of the man, or want of chastity on the part of the woman, may be, but is not necessarily, a defence; and, while the deceived woman might plead the one, or the deceived man the other, to justify breaking off the match, neither party can be permitted to set up his or her own physical incapacity or want of chastity to defeat the suit.² It is held recently that under a statute which pronounces the marriage of a person incurably impotent absolutely void, a breach of such a person's promise to marry constitutes no cause of action;³ and yet

¹ Chitty Contr. 795; Hall v. Wright, E. B. & E. 746; Baker v. Cartwright, 10 C. B. N. s. 124.

² Hall v. Wright, E. B. & E. 746.
³ Gulick v. Gulick, 41 N. J. L. 18.

why an impotent person's promise could not be relied upon as a ground of damages by the other, who was misled into the match without fault, we know not.¹ Insanity at the time of passing the promise is of course a good defence, but only because inconsistent with the idea of mutual assent; and former insanity could not be alleged in justification of the breach.² That either of the parties (or both) is sick, infirm, incapable of breeding or procreation, or has led an immoral life, is not on principle a fatal obstacle to marriage, if the parties choose to take one another upon that understanding; nor is a *bona fide* contract for damaged goods less capable of enforcement *per se* than one for goods that are sound.

The defendant's pre-engagement to another cannot avail against a suit for breach of promise; for this again would be alleging one's own wrong in exculpation;³ and the plaintiff's pre-engagement, if offered by way of excuse, should be alleged as the plaintiff's fraud upon the defendant.⁴ A promise to marry procured by fraudulent representation or concealment as to past life and circumstances would be a good defence;⁵ our law in this respect applying the *caveat emptor* less rigidly, doubtless, than in the consummation of a marriage,⁶ though the decisions do not clearly draw the line. A man, ignorant of a woman's immoral character at the time of the engagement, can break off the match upon finding it out; or if she prove unchaste subsequently.⁷ This presupposes that he is not at fault; for if he has seduced her, or had carnal intercourse with her, or even condoned her fornication with others, he cannot set up her misconduct in defence.⁸ Upon corresponding principles a woman can break off a match because she has ascertained that the man is of immoral character;⁹ or because he treated her, during the engagement, in a brutal and violent manner.¹⁰ Mere rumor or suspicion of bad character does not, however, clear one from an engage-

¹ See *Sprague v. Craig*, 51 Ill. 288; *post*, § 49.

² *Baker v. Cartwright*, 10 C. B. N. S. 124; *Hall v. Wright*, *supra*.

³ *Beachey v. Brown*, E. B. & E. 796.

⁴ *Ib.*

⁵ *Abbott, C. J.*, in 1 C. & P. 529.

⁶ *Cf. supra*, § 26.

⁷ *Von Storch v. Griffin*, 77 Penn. St. 504; *Sprague v. Craig*, 51 Ill. 288.

⁸ *Snowman v. Wardwell*, 82 Me. 275; *Johnson v. Smith*, 3 Pittsb. 184.

⁹ *Baddeley v. Mortlock*, Holt N. P. 151.

¹⁰ *Leeds v. Cook*, 4 Esp. 257.

ment, nor does misconduct known at the time the promise was made.

Breach of a promise to marry cannot be justified on the ground that the defendant felt convinced that the proposed marriage would not promote the plaintiff's happiness; that the engagement proved their incompatibility of tastes and temperament; that they failed to respect or love one another, and the like.¹ Morally speaking, these are excellent reasons for breaking off a match; but the offended party has, nevertheless, at the law the right to a money recompense, and for the courts to hold otherwise would well-nigh abolish the action.

Though decisions are not copious, we perceive that the principle of defence is the same, whether man or woman be the defendant, some allowance being made of course for differences of sex, as between the weaker and stronger; that both parties are taken to be bound equally by a mutual promise to unite later in marriage; but that justifying cause of a breach may arise either out of matters antecedent to the engagement or matters pending its fulfilment, the discovery, for instance, of lewdness previous or subsequent to the interchange of promises. If one were prevented by act of God from performing the contract, the usual rule of contracts would seem to apply, though, as we have seen, no such action is permitted to survive against personal representatives.² Fault is taken especially into consideration in such suits; and even where a plea is inadequate as a defence, it may, nevertheless, be available to the defendant in mitigation of damages.

§ 49. IX. *Rule of Damages; Miscellaneous Points of Practice.* — As to the damages allowable in actions for breach of promise, the general principle is that of compensating the aggrieved party for the loss sustained in consequence of the non-fulfilment of a contract. And yet, from the nature of the case, such damages are not easily liquidated, and a jury must exercise great latitude of discretion, according to the circumstances, just as in actions founded on a tort. The plaintiff's avoidance of a marriage without affection might in

¹ Coolidge v. Neat, 129 Mass. 146.

² *Supra*, § 42.

reality be esteemed a gain rather than a loss. But the law does not so reason; it allows the prospective money value or worldly advantage of the marriage which is lost to be taken into the estimate of damages; and, moreover, the injury to the plaintiff's affections, the mortification, and the distress of mind consequent upon breaking off the match.¹ The loss of time and the reasonable expenses incurred in preparation for marriage are grounds of damage not special, but directly incidental to the breach of promise, and hence the length of the engagement and the progress made towards a fixed wedding-day may have a material bearing upon the amount to be awarded.² In suits where the woman is plaintiff, damages are heavily aggravated in case she appears to have been seduced upon faith of the engagement; and here the defendant becomes assessed in fact chiefly by way of exemplary damages for debauching his betrothed,³ though all the items involved in a breach of promise are considered as before, to swell the round sum awarded. The means and social standing of the defendant may properly, on the considerations above noticed, be shown in evidence in breach of promise suits.⁴

In mitigation of damages for breach of promise to marry may be shown the plaintiff's dissolute habits and character, drunkenness, incontinence, and the like, such as to unfit that party for companionship in married life,⁵ though not mutual

¹ *Berry v. Da Costa*, L. R. 1 C. P. 331; *Chitty Contr.* 795, and cases cited in note of Perkins; *Sedgwick Damages*, 2d ed. 868; *Coolidge v. Neat*, 129 Mass. 146; *Harrison v. Swift*, 13 Allen, 144; *Lawrence v. Cooke*, 56 Me. 187; *Sheahan v. Barry*, 27 Mich. 217.

² *Smith v. Sherman*, 4 Cush. 408; *Grant v. Willey*, 101 Mass. 356; *Coolidge v. Neat*, 129 Mass. 146. That a wedding-day was announced and invitations sent out tends, too, to enhance damages, as making the mortification and distress greater. See *Reed v. Clark*, 47 Cal. 194.

³ *Berry v. Da Costa*, L. R. 1 C. P. 331; *Bennett v. Beam*, 42 Mich. 346; *Kelley v. Riley*, 106 Mass. 339; *Williams v. Hollingsworth*, 6 Baxter, 12;

Sauer v. Schulenberg, 33 Md. 288; *Hatting v. Chapman*, 46 Conn. 607; *Sheahan v. Barry*, 27 Mich. 217.

Seduction of plaintiff by defendant by means of the alleged promise must be alleged in the complaint; otherwise proof thereof will not be admitted to enhance the damages. *Leavitt v. Cutler*, 37 Wis. 46; *Cates v. McKinney*, 48 Ind. 562.

⁴ *Bennett v. Beam*, 42 Mich. 346; *Hunter v. Hatfield*, 68 Ind. 416; *Lawrence v. Cooke*, 56 Me. 187.

⁵ *Van Storch v. Griffin*, 71 Penn. St. 240; *Button v. McCauley*, 1 Abb. N. Y. App. 282; *Hunter v. Hatfield*, 68 Ind. 416; *Williams v. Hollingsworth*, 6 Baxter, 12.

improprieties and lewdness together.¹ Whatever shows, too, that the plaintiff viewed the proposed marriage in a spirit not befitting the relation, and inconsistent with a purpose to fulfil its objects faithfully, — as, for instance, admissions that the defendant's proposals were accepted to spite others, or only for the sake of his money, — is competent for the same purpose.² And as to such admissions on the plaintiff's part, the material question is, not when they were made, but what they tended to prove,³ and whether they indicated the true state of the plaintiff's feelings while the engagement itself subsisted. The defendant's incurable disease may also be shown in mitigation of damages;⁴ and so, probably, his physical impotence or imbecility of mind. The defendant may rebut any testimony of high social position or wealth;⁵ and, in short, introduce evidence on his part which may tend to reduce the damages, whether by way of exculpating himself, throwing the blame upon the plaintiff, or simply showing that the pecuniary loss to the latter through the failure of the match is less than represented.

A woman's good name is so sacredly guarded by our law that where the male defendant to an action for breach of promise makes wanton, malicious, or reckless allegation in defence that the plaintiff is unchaste, having no reason to believe such allegation true, his failure to exhibit the fact in proof may be taken in aggravation of the damages.⁶

Imprisonment for debt having been abolished in England and this country during the present century, a defendant cannot now be rightfully arrested for a cause of action which is based simply upon a breach of promise to marry, apart from any charge involving fraud or other legal turpitude.⁷

¹ *Johnson v. Smith*, 3 Pittsb. 184.

² *Miller v. Rosier*, 81 Mich. 475.

³ *Cooley, J.*, in *Miller v. Rosier*, *supra*; *Hook v. George*, 100 Mass. 331. But see *Miller v. Hayes*, 34 Iowa, 496, which excludes evidence of such admissions on the plaintiff's part, when made since the commencement of the action.

⁴ *Sprague v. Craig*, 51 Ill. 288. Cf. *Gulick v. Gulick*, 41 N. J. L. 13.

⁵ *Sprague v. Craig*, *supra*.

⁶ *Simpson v. Black*, 27 Wis. 206;

Leavitt v. Cutler, 37 Wis. 46; *Powers v. Wheatley*, 45 Cal. 118; *Reed v. Clark*, 47 Cal. 194. This is as far as the reason of the principle extends; but the language of some New York decisions would seem to make the rule more sweeping. See 6 Cow. 654, cited in *Thorn v. Knapp*, 42 N. Y. 474; *Tompkins v. Wadley*, 3 Thomp. & C. 424.

⁷ *In re Tyson*, 82 Mich. 262; *Perry v. Orr*, 35 N. J. L. 295.

Defendant is entitled to inspect

§ 50. X. Concluding Observations upon the Action for Breach of Promise; the Action an Anomalous one.—It is perceived that this action for breach of promise is anomalous; founded, theoretically, upon the law of contract; and yet, in respect of damages and certain other points, seeming to be grounded rather in tort. The aggravation of damages for seduction or for assailing the woman's good name in the pleadings partakes manifestly of the action in tort, and, in general, the damages in a suit for breach of promise to marry are of that punitive, vague, unliquidated character which we associate with remedies for private wrongs; all statements as to placing the injured party where he or she would have been with the contract fulfilled being quite inappropriate, and the main issue resolving itself into a computation of mental anguish and losses of opportunity, such as arithmetic cannot figure out with exactness. For mitigation of these damages, for defence generally, the effort at present quite frequent is to recriminate, as in divorce suits, the sexual relations giving more complexion to the legal proceedings than any mere agreement, as between A. and B., to do a certain thing.

In truth, the contract to marry, under our modern civilized rule of courtship, which regards the woman's word and will in a betrothment, instead of leaving her for a parent to dispose of, brings a contracting pair of opposite sexes into a certain close relation known as an engagement,—a relation preliminary and probationary, as it were, with reference to marriage, and yet distinct. There is a contract to enter hereafter into a status; but there is an intermediate status created, meanwhile, which it is mutually understood shall influence the fulfilment of that contract. Hence we find, when suit is brought for breach of promise, matter of justification set up at one time with reference to the circumstances and terms of the contract; at another, with regard to misbehavior connected with the engagement. Thus is perceived the difficulty of treating the breach of promise to enter into closer sexual relations like a simple breach of contract at common law, where parties undertake, as between man

his love-letters in the plaintiff's possession, bearing upon the amount of damages. *Pape v. Lister*, L. R. 6 Q. B. 242.

and man, and apart from love and sentiment, to do a certain thing in the future.

§ 51. *The same Subject; Doubtful Policy of such Actions.* — On the whole, we may question whether this right to sue for breach of promise is not productive of more evil than good. It is admitted that only one sex makes practical use of such a remedy, though its logical application should be mutual; and of that sex, moreover, but few of the finer grained. It is admitted, too, that the marriage state ought not to be lightly entered into; that it involves the profoundest interests of human life, transmitting its complex influences direct to posterity, and invading the happiness of parents and near kindred; that the step once taken is well-nigh irrevocable. From such a standpoint we view the marriage engagement substantially as a period of probation for both parties, — their opportunity for finding one another out; and if that probation results in developing incompatibility of tastes and temperament, coldness, suspicion, an incurable repugnance of one to the other, though all this may impute no vice to either, nor afford matter for judicial demonstration, duty requires that the match be broken off. What, then, shall be the consequence to the party who conscientiously takes the initiative? Analyze our reported breach of promise cases, and we shall see that the fair plaintiff is frail on the point most essential to womanly self-respect, in the majority of instances: that she has unwisely granted to her lover the indulgences of a husband; or that she was a soiled dove when he offered himself; or, more brazen still, that she has been loose with other men while plighted in affection. That the man's virtue, in such cases, will usually bear comparison, we need not contend, since in practice it is not he that invites litigation. In the interests of morality, then, and for the sake of compensating the innocent few who complete this record,¹ and whose vows, moreover, were made in a befitting spirit,² should so much festering corruption be yearly exposed to a jesting community, under the misnomer of a blighted affection, and jealousy exact her blackmail? Are the fallen victims of passion

¹ Like the plaintiff in *Homan v. Earle*, 53 N. Y. 267.

² As, *semble*, was not the case in *Miller v. Rosier*, 81 Mich. 475.

to represent the victims of exalted love? Courts have found it necessary, of late, to insist emphatically that a man is not bound by a contract to marry a lewd woman which he entered into in ignorance of her character.¹ This stricture, however, by no means debars all the lewd women from suing for breach of promise, nor even all the impenitent.² And however honorably one may have acquitted himself of an imprudent engagement before its consummation, the right which is conceded him by law, of showing a justification by way of mitigating damages, does not cover the case; for, letting alone the difficulty of proof, most men would rather pay hush-money than have the whole story of a love-folly trumpeted in the newspapers.

Seduction furnishes another, and, properly speaking, quite a distinct case from the loss of a marriage opportunity. For this offence, so revolting to every instinct of manly honor, a moral and physical wrong, accompanied by social degradation, renders it proper that the victim should have some right of action. For the common law and the common sense of mankind unite in treating the man as more culpable than the woman in such a case, and the woman as more grievously ruined than the man. But instead of taking seduction as the time-honored appendage to breach of promise and other collateral suits,³ it seems fitter, as some of our States now provide by law, to make seduction a distinct and independent ground of action.⁴ Where, too, a man, whether under promise to marry or not, gets a woman with child, she should have some sort of legal recourse for the child's sake, if not her own. In this latter case, and, indeed, in the former, a criminal magistrate will feel that the law does its best when, by a judicious exercise of influence, he can prevail upon the guilty pair, no impediment existing, to unite in marriage.⁵

¹ Von Storch v. Griffin, 77 Penn. St. 504.

² See, for instance, Sheahan v. Barry, 27 Mich. 217; Sprague v. Craig, 51 Ill. 288.

³ *Supra*, § 49.

⁴ Cates v. McKinney, 48 Ind. 562.

⁵ *Supra*, § 28.

CHAPTER III.

RESTRAINT OF MARRIAGE.

§ 52. *Restraint of Marriage not favored; Limitations of Rule.*

— The policy of restraining marriage is treated with disfavor by our law, which on the contrary seems disposed to encourage the institution, though not to the extent practised by some countries of openly promoting its observance, or forcing private inclination in the conjugal direction. Numerous cases, those particularly which construe the provisions of testamentary trusts, have laid it down that the general restraint of marriage is to be discouraged. Accordingly a condition subsequent, annexed by way of forfeiture to a gift, legacy, or bequest, in case the donee or legatée should marry, will be held void and inoperative, as a restraint upon marriage; and so as to both income and capital.¹ But marriage and remarriage are differently viewed in this respect; and it is well settled that forfeiture by condition subsequent in case a widow shall marry again must be upheld as valid, whether that widow be the beneficiary through her husband or some other person. Does the latter rule apply equally to widow and widower, woman and man? Upon full consideration the English chancery held a few years ago, on appeal (reversing the decision of the lower tribunal), that it does; and accordingly sustained a proviso under the will of a certain testatrix, by which property bequeathed in trust, with income payable to the surviving husband, went over upon his marrying again; this interesting point being raised for the first time.²

¹ See *Bellairs v. Bellairs*, L. R. 18 Eq. 610, and cases cited.

² *Allen v. Jackson*, 1 Ch. D. 399, reversing s. c. L. R. 19 Eq. 631. See opinion of James, L. J., and authorities cited.

Rights are equal as to marrying

again, so far as widow and widower are concerned, as all will readily admit.

The lower court was probably influenced by considerations which medical men adduce, showing that marriage is more essential to a man's continuous well-being than a woman's, and that a

The latest English decisions, on the whole, do not strenuously resist these restraints upon marriage in testamentary trusts. It is held that a gift to one's widow on condition that she retire immediately into a convent is upon a good condition precedent.¹ Also, that it is a good condition subsequent which forfeits a gift to one's brother in case he marries "a domestic servant," or one of lower degree, degrading his own family.² And it is doubtful whether the rule discouraging restraint of marriage can extend to devises of land; though on principle there should be no distinction between devises and gifts or bequests in this respect.³

widow, on the whole, is less likely to have sufficient reason for marrying again than a man. But this argument, if sound, is perhaps far-fetched, and James, L. J., on appeal, treated the subject more from the aspect of equal rights, as between the sexes, in the disposal of property. No act of parliament or decision of a court, he ob-

served, established any distinction here between the second marriage of man or woman, and he knew of no reason for making it.

¹ *Duddy v. Gresham*, 39 L. T. x. s. 48.

² *Jenner v. Turner*, 29 W. R. 99.

³ *Jones v. Jones*, 1 Q. B. D. 279.

PART III.

THE PERSON OF THE SPOUSE; GENERAL RIGHTS AND DISABILITIES OF THE MARRIAGE RELATION.

CHAPTER I.

EFFECT OF MARRIAGE; PERSON OF THE SPOUSE.

§ 53. *Law of Husband and Wife; Order of Examination.* — When the parties to a lawful marriage have once completed the ceremony, or, as it is said, have executed the contract of marriage, they are admitted into the marriage relation, and their mutual rights and obligations become at once bounded, protected, and enforced by the general law of husband and wife. What that law is will constitute the topic of discussion in this and most succeeding parts of the work. We have already alluded to the confusion and uncertainty which exist at the present day, and particularly in many of the United States, in the law of husband and wife, owing to the transition period through which we seem to be passing from the marriage relation of the common law to that known to the civil law.¹

Our subject will be most conveniently treated by taking up the common-law doctrine first, and thoroughly examining its principles; then passing to the modern or civil-law doctrine for discussion in like manner. First, then, the rights and disabilities of marriage on the coverture scheme; secondly, the rights and disabilities of marriage on the separate existence scheme.

But since these rights and disabilities have varied little,

¹ See Introductory, Part I. §§ 6, 7.

except as to the wife's property, we may here investigate those general principles of the common law which concern the person of the spouse once and for all.

§ 54. *Person of the Spouse; Common-law Principle of Coverture; Baron and Feme.*—The general principle of coverture, as defined by Blackstone and other writers, is this: that by marriage the husband and wife become one person in law; that is to say, the very being or legal existence of the woman is suspended during the marriage, or, at least, is incorporated and consolidated into that of the husband, under whose wing, protection, and *cover* she performs everything; and is therefore called in the law-French a *feme covert*, *fœmina viro coperta*; is said to be *covert-baron*, or under the protection and influence of her *baron* or lord; and her condition during her marriage is called her *coverture*.¹ For this reason the term applied to the relation of husband and wife in the old books is *baron and feme*. Upon this fundamental principle depend, at the common law, the general rights, duties, and disabilities of marriage. But this very definition shows inaccuracy, to say nothing of unfairness of application. Here are two conflicting notions: one that the existence of the wife is actually lost or suspended; the other that there is still an existence, which is held in subordination to the will of her lord and master, which last the word *coverture* fitly expresses. It will appear in fact that while some of the wife's disabilities seem based upon the one notion, others are based upon the latter, and probably more correct one. The wife's disabilities are deemed by Blackstone "for the most part intended for her protection and benefit." And he adds, by way of rhetorical period, "so great a favorite is the female sex of the laws of England!" a proposition which his commentators have gravely proceeded to dispute and dissect, and, it must be added, not without good success.²

§ 55. *Husband Head of the Family at Common Law; Reciprocal Rights and Duties of the Union.*—The husband's right of

¹ 1 Bl. Com. 442; Co. Litt. 112; in a strain of playful gallantry, not uncommon with lecturers. Even Chancellor Kent's observations are not free from suspicion. See 2 Kent Com. 182, closing sentence at foot of the page.

² 1 Bl. Com. 445, notes by Christian, Hargrave, and others. It is probable that Blackstone used this expression

dominion is therefore fully recognized at the common law. And never was the English doctrine, despite its failings, set forth in more terse and forcible language than in the words of Sir Thomas Smith: "The naturalest and first conjunction of two towards the making a further society of continuance is of the husband and wife, each having care of the family: the man to get, to travel abroad, and to defend; the wife to save, to stay at home, and to distribute that which is gotten for the nurture of the children and family; which to maintain God has given the man greater wit, better strength, better courage, to compel the woman to obey by reason or force; and to the woman beauty, fair countenance, and sweet words, to make the man obey her again for love. Thus each obeyeth and commandeth the other; and they two together rule the house so long as they remain in one."¹

In accordance with these principles, and perhaps, too, the laws of nature and divine revelation, the husband is the head of the family, and *dignior persona*. As to the more strictly personal consequences of the marriage union, his rights and duties have suffered no violent change at our modern law. It is for the wife to love, honor, and obey: it is for the husband to love, cherish, and protect. The husband is bound to furnish his wife with a suitable home; to provide, according to his means and condition of life, for her maintenance and support; to defend her from personal insult and wrong; to be kind to her; to see that the offspring of their union are brought up with tenderness and care; and generally to conduct himself, not according to the strict letter of the matrimonial contract, but in its spirit. So long as he does this, his authority is acknowledged at the common law; and if the wife's wishes and interests clash with his own, she must yield.²

§ 56. *Duty of Spouses to adhere or live together.* — Marriage necessarily supposes a home and mutual cohabitation. Each

¹ Commonwealth of England, Book 1, ch. 2, quoted in Bing. Inf. & Cov. p. 184.

² Lord Stowell observes that the law entrusts the husband not only with a certain degree of care and protection,

but also "with authority over his wife. He is to practise tenderness and affection, and obedience is her duty." *Oliver v. Oliver*, 1 Hag. Con. 361; 4 Eng. Ec. 429.

party has therefore a right to the society of the other. They married to secure such society. And the obligation rests upon both to live together — or, as the expression sometimes goes, *to adhere*. This is the universal law.¹ Its observance is essential to the mutual comfort of husband and wife, and the well-being, if not the existence, of their children. But to this rule there are obvious exceptions. The wife is not bound to live with her husband where he is imprisoned, or has otherwise ceased to be a voluntary agent and to perform the duties of a husband. Nor if he is banished. For marriage does not force the parties to share the punishment of one another's crimes. This was the rule of the civil as it is that of the common law.² And in general such causes as would justify divorce in any State justify the innocent party in breaking off matrimonial cohabitation likewise. But partial and temporary separation for purposes connected with the husband's profession or trade — as, for instance, where he is an army officer — constitutes no breach of the marriage relation unless continued beyond necessary and reasonable bounds, or accompanied by negligence to provide, while absent, for the maintenance of wife and family. And under some other circumstances cohabitation may be properly allowed to cease for a time without involving the breach of marital obligations.³

§ 57. *Breach of this Obligation; Desertion.* — This subject is most commonly considered where redress is sought because one or the other party deserts; such desertion formerly calling for the restitution of conjugal rights, but in these days furnishing rather a cause of divorce to the injured spouse, not to speak of the enlargement of an abandoned wife's rights and responsibilities, despite the rules of coverture. These matters, and particularly divorce for desertion, will be duly considered in place hereafter, and the duty of matrimonial adherence more fully developed.⁴ We observe here that, in conformity to the world's customs and general principle, it is

¹ 1 Fras. Dom. Rel. 447, 452.

Dom. Rel. 240, *et seq.*; *Ib.* 447; Chretien

² Co. Litt. 188; 1 Bl. Com. 443;

v. Husband, 17 Martin (L.), 80.

1 Fras. Dom. Rel. 448; 2 Kent Com. 154.

⁴ See Separation, Divorce, *post*; 1 Bish. Mar. & Div. §§ 771-810.

³ See 2 Kent Com. 181; 1 Fras.

the wife's actual withdrawal from home which admits the less readily of a justifying explanation, and exposes the pair to scandal.¹ But the husband may be at fault by making the home unfit for an honest wife to occupy with dignity, or by turning his wife out, or even by encouraging her to leave it when it was right that she should remain.² It happens often that the husband instead forsakes the home, leaving the wife in it, such withdrawal being rightful or wrongful according to the circumstances.³

§ 58. *Duty of making Cohabitation Tolerable.* — Mere frailty of temper on a wife's part, not shown in marked and intolerable excesses, would hardly justify a husband in withdrawing the protection of his home and society.⁴ But it is held that the wife's violent and outrageous behavior justifies a husband in seeking divorce from bed and board, and, seemingly, in leaving her.⁵ The moral duty of living together involves, doubtless, the reciprocal obligation of making that life agreeable, according to the true status of the married parties; but the extent of the legal duty is not so easily definable. Upon the point of redress, in fact, codes widely differ; the practical difficulty being, under our laws, that married spouses have little remedy until it comes to the last extremity of divorce.⁶ Manifestations of bad temper on one side must necessarily weaken the duty of adherence on the other; extreme cruelty, or cruel and abusive treatment, is now frequently made a legal cause of divorce; yet, at the same time, mutual forbearance and self-sacrifice are essential to the well-being of every household; marriage, when rightly considered, working a harmony of character by the constant attrition to which the two natures are exposed.

Under this head we may add that the duty of cohabitation or adherence is not fulfilled by literal or partial compliance. Thus the refusal of sexual intercourse and the nuptial bed, without good excuse, is a serious wrong which husbands, at

¹ *Id.*; *Starkey v. Starkey*, 21 N. J. Eq. 185.

² *McCormick v. McCormick*, 19 Wis. 172.

³ *McClurg's Appeal*, 66 Penn. St. 366. See *Divorce for Desertion*, *post*.

⁴ *Yeatman v. Yeatman*, L. R. 1 P. & D. 489.

⁵ *Lynch v. Lynch*, 33 Md. 328.

⁶ See *Divorce for Cruelty, &c.*

all events, are disposed to construe into justifying ground for divorce.¹ Living in the same house, but wilfully declining matrimonial intimacy and companionship, is *per se* a breach of duty, tending to subvert the true ends of marriage. So, too, a husband who unreasonably withdraws cohabitation from his wife may be deemed guilty of legal desertion, even though he continue to support her.² But sexual intercourse, the use of the same chamber, or the occupation of the same bed, should be mutually regulated with considerations of health as well as kindly forbearance; and a husband who wantonly abuses his wife so as to inflict needless pain and injury upon her, and disregards her health and delicate organization, is guilty of legal cruelty.³

§ 59. **The Matrimonial Domicile.**—As there must be a home, so there is also a matrimonial domicile of the parties recognized by universal law. And the husband, as *dignior persona*, has the right to fix it where he pleases. The wife's domicile merges in that of her husband. Grotius says: "*De domicilio constituere jus est marito.*"⁴ But this applies only to the real domicile of the husband; not to a fictitious place of residence which he may take up for a special purpose, or as an involuntary agent. In a genuine sense the domicile of the husband becomes that of the wife, and wherever he goes she is bound to go likewise; not, however, unless his intent be *bona fide* and without fraud upon her person or property rights.⁵

What is this domicile of the husband, we may ask? Every one has his domicile at the law. And between domicile and residence there is a marked distinction, the former being in law more generic and determining one's municipal forum. Residence, to be sure, is a fixed place of abode, as distinguished from one's mere local situation for temporary purposes; but domicile is more than this, it is a residence which

¹ See *Divorce, post*; *Southwick v. Green*, 275. See *Shaw v. Shaw*, 17 *Southwick*, 97 *Mass.* 327; 1 *Bish. Mar. & Div.* 5th ed. § 778.

² 2 *Kent Com.* 181; 1 *Fras. Dom.*

³ *Yeatman v. Yeatman*, L. R. 1 P. & D. 489.

⁴ *Rel. 240 et seq.*; *Ib.* 447.

⁵ 1 *Fras. Dom. Rel.* 447, 448; 1

⁶ *Ib.*; *Moores v. Moores*, 1 C. E. Burge *Col. & For. Laws*, 260; *Wharton Conf. Laws*, §§ 43-47.

is fixed, whether absent or present, with the idea of a permanent establishment of one's legal status. Domicile and change of domicile depend on the choice of the party. And so free is this choice that one may change his domicile while absent in the military service or travelling from place to place, provided the intent appear.¹ Circumstances and facts evincing this intent, and corroborative of, apart from or even contradicting, one's own statement, are conclusive on this point; so that in determining a man's actual domicile, it is always material to consider where his wife and children live permanently, and where his establishment is kept up.² The facilities of modern travel from country to country give rise to greater uncertainties of fact than formerly. It is said that a man having acquired a domicile of choice may abandon it without its being incumbent on him to acquire a new domicile of choice;³ and doubtless many persons desiring to travel make themselves citizens of the world after this manner, escaping taxation and disregarding the purposes of domicile. Here, however, our law will find a domicile, when the question arises (as, for instance, upon the settlement of the person's estate after decease), either by refusing to consider the abandonment of the old domicile complete before a new one was acquired, or by holding that the older domicile, the domicile of origin, reverts upon such abandonment; in short, by excluding as far as possible the inference of expatriation, utter and absolute, from dubious circumstances.⁴ Every one has, by birth, a domicile of origin, and this domicile of origin is presumed to continue until abandoned for another.⁵

§ 60. **Same Subject; Husband establishes the Domicile.** — We have said that in the *bona fide* domicile of the husband that of the wife merges. In certain cases the wife may perhaps be said to acquire a domicile or legal forum for divorce and

¹ *Moore v. Harvey*, 128 Mass. 219.

R. 1 H. L. Sc. 518. But cf. *Kellogg*

² *Platt v. New South Wales*, L. R. 3 App. 336; *Stevenson v. Masson*, L. R. 17 Eq. 78; *Hayes v. Hayes*, 74 Ill. 312; *Hindman's Appeal*, 85 Penn. St. 466; *Long v. Ryan*, 30 Gratt. 718.

v. Winnebago, 42 Wis. 97.

⁴ See *Von Hoffman v. Ward*, 4 Redf. Surr. 244; *King v. Foxwell*, 8 Ch. D. 518.

⁵ *Jessel, M. R.*, in *King v. Foxwell*, 8 Ch. D. 518, citing *Udny v. Udny*, L.

⁵ *Ib.* And see elementary works on Domicile.

similar purposes.¹ But the exception, if it exist, is limited by the necessity. To a wife living apart from her husband, no separate domicile is conceded for testamentary purposes.² Nor does a change of the wife's abode change the husband's or the matrimonial domicile.³

Any contract, therefore, which the husband may make with his wife or her friends, before marriage, not to take her away from the neighborhood of her parents, is void. Public policy repudiates all contracts in restraint of such marital rights. There might be circumstances under which such a promise would be reasonable, but at best it can create a moral obligation only. The husband has the right to establish his domicile at any time, wherever he pleases, and the wife must follow him through the world.⁴ If she refuses to go with him, his own conduct being upright and honorable in the premises, she places herself in the wrong, and while she persists he is not bound to support and maintain her.⁵

§ 61. **Same Subject; Modifications in Wife's Favor; Recent Instances.** — But the courts of our day hesitate to apply a rule so apparently harsh as that announced in the last sentence. With the increasing regard for female privileges has grown up a strong disposition to reduce the husband's right over the matrimonial domicile to a sort of *divisum imperium*. The question is not new, whether reasonable exceptions to this rule may not exist; as, for instance, where the husband proposed to take the wife into an enemy's country while war was waging, or on a journey perilous to her life.⁶ Such exceptions may be justified, it is generally admitted, on the ground that the wife would be thereby exposed to bodily harm. But, whether the apprehension be that of personal violence, or ill health from the fatigue of a journey or the change of climate, little favor seems to have been shown to the wife either at the English or Scotch law, unless the circumstances rendered a change of domicile on her part equiv-

¹ See Divorce, *post*.

² Paulding's Will, 1 Tuck. (N. Y.) 47.

³ Porterfield v. Augusta, 67 Me. 556;

Scholes v. Murray Iron Works Co., 44

Iowa, 190; Johnson v. Johnson, 12

Bush, 485.

⁴ Hair v. Hair, 10 Rich. Eq. 168;

McAfee v. Kentucky University, 7

Bush, 135.

⁵ Babbitt v. Babbitt, 69 Ill. 277.

⁶ Boyce v. Boyce, 23 N. J. Eq. 837.

alent to a moral suicide.¹ At the present day, a rule less stringent would doubtless be applied. A husband would not be permitted to remove his wife to some remote and undesirable place for the sake of punishing or tormenting her, or so as to compel her to stay alone where he did not mean to reside himself; for this would not be fixing the matrimonial domicile with honest intent.² Nay, more, there are several recent decisions in this country which point to an obligation on the husband's part to show reasonable cause why his wife should follow him when he changes his abode.³

This later uncertainty in the law is unfortunate. Where a pair disagree in the choice of a home, either the right of decision must belong to one of them, or the court should sit as umpire. No one has suggested that the wife should choose the domicile, nor can judicial interference be well called in, except to divorce the parties. Yet, without a home in common, of what avail is matrimony? We cannot but regret that any of our courts should seem to legalize domestic discord; that there should be good American authority to sanction the wife's refusal to accompany her husband on any such trivial pretext as "the dislike to be near his relatives."⁴ Perhaps, however, the harsh remedy usually sought to be applied in modern cases — divorce for the wife's wilful desertion — may tempt our tribunals to relax the old doctrine of conjugal obedience for her benefit. For, after all, the decision is in favor of prolonging the marriage relation.

The English rule as to the wife's duty of adherence still continues strict. A wife petitioned for divorce on the ground of her husband's desertion. The facts showed that shortly after her marriage she went with her husband to Jamaica, where he held an appointment from which he derived not more than £100 a year, and in consequence of his slender income she had to put up with some hardship. Her health suffered, and in less than a year, namely, in 1846, she returned to England. Her husband continued abroad, during

¹ See 1 *Fras. Dom. Rel.* 448.

v. Powell, 29 *Vt.* 148. See *Moffatt v.*

² *Boyce v. Boyce*, 28 *N. J. Eq.* 387.

Moffatt, 5 *Cal.* 280; *Cutler v. Cutler*, 2

³ *Bishop v. Bishop*, 30 *Penn. St.* 412;

Brews. (Pa.) 511.

Gleason v. Gleason, 4 *Wis.* 64; *Powell*

⁴ *Powell v. Powell*, 29 *Vt.* 148.

the greater part of the time at Jamaica, where he succeeded in getting a more lucrative appointment. When she left him for England he acted kindly to her, promised to allow her £30 a year, but made no arrangement for a permanent separation. Their correspondence continued until 1851, when the husband asked her to return, and provided funds for her passage, but she wrote that her health would not permit her to do so. Here all correspondence and intercourse ceased until 1856, when an allowance was again effected through the intervention of a relative; this the husband continued until 1860, and then stopped it. He appears to have led a loose life after the wife's refusal to return. The court held that these circumstances did not constitute desertion on the husband's part, nor entitle her to divorce.¹

§ 62. *Domicile relative to Alien and Citizen.* — As corollary of the general proposition already announced, it is held that an alien woman marrying with a citizen of the United States becomes, by virtue of such marriage, a citizen also, with the usual capacity as to purchase, descent, and inheritance;² and that of aliens intermarried, if the husband becomes a naturalized citizen, the wife in like manner is naturalized, even though she has not yet migrated from her native country.³

§ 63. *Woman's Name changed by Marriage.* — Marriage at our law does not change the man's name, but it confers his surname upon the woman. Until a decree of divorce, giving a married woman leave to resume her maiden name, goes into full effect, or widowhood is succeeded by a new marriage and another husband, she goes by her former husband's surname. This is English and American usage. And with this actual marriage name, it would appear that a wife can only obtain another name by reputation.⁴ But in consideration of the rule that a person has the right to be known by any name he or she chooses, proceedings under the assumed name of a married woman have been upheld after judgment.⁵

¹ *Keech v. Keech*, L. R. 1 P. & D. 641 (1868). Adultery being proved, however, divorce was granted on that ground.

² *Luhns v. Elmer*, 80 N. Y. 171; *Kelly v. Owen*, 7 Wall. 496.

³ *Kelly v. Owen*, 7 Wall. 496; *Headman v. Rose*, 68 Ga. 458.

⁴ *Fendall v. Goldsmied*, 2 P. D. 263.

⁵ *Clark v. Clark*, 19 Kans. 522.

§ 64. **Right of one Spouse to the other's Society; Suit for Enticement.** — Each spouse is entitled to the society and companionship of the other. Inasmuch as the husband is thus entitled, he may recover his wife from any person who would withhold or withdraw her from him. This is a well-understood principle the world over.¹ And the common law gives him the right to sue for damages all persons who seek to entice her away.² But in such cases malice and improper motive are always to be considered; and parents and near relatives stand on a different footing from strangers. So is the previous conduct of the husband towards his wife a material element to be considered; since this, and not the interference of others, may have occasioned the separation. It is one thing to actively promote domestic discord, but quite another to harbor from motives of kindness and humanity one who seeks shelter from the oppression of her own lawful protector.

Yet such conduct, whatever the motives, is, on the part of strangers, exceedingly perilous, generally open to misconstruction, and never to be encouraged. They should leave the parties to their lawful remedies against one another. With parents it is different. There are several cases in the American reports where a father is not only held to be absolved from liability for sheltering his daughter, who has fled from a drunken and profligate husband, but even stimulated to do so. "A father's house," says Chancellor Kent, "is always open to his children; and whether they be married or unmarried, it is still to them a refuge from evil and a consolation in distress. Natural affection establishes and consecrates this asylum."³ But this does not justify even a parent in hostile interference against the husband; for the latter's rights are still superior; and the father must give up his daughter, and the marriage-offspring, whenever she wishes to return, unless the proper tribunal has decreed otherwise; though he might, we suppose, by fair arguments, urged to

¹ 1 *Fras. Dom. Rel.* 240, 241.

² 1 *Chitty Plead.* 91; *Hutcheson v. Peck*, 5 *Johns.* 196; *Friend v. Thompson*, *Wright*, 636; *Rabe v. Hanna*, 5 *Ham.* 530; *Bennett v. Smith*, 21

Barb. 439; *Barnes v. Allen*, 30 *Barb.* 663.

³ *Hutcheson v. Peck*, 5 *Johns.* 196. See also *Friend v. Thompson*, *Wright*, 636; *Bennett v. Smith*, 21 *Barb.* 439; *Smith v. Lyke*, 20 *N. Y. Supr.* 204.

promote her true good, seek to dissuade her from returning. The legal doctrine seems to be this, that honest motives may shield a parent from the consequences of indiscretion, while adding nothing to the right of actual control; the intent with which the parent acted being the material point, rather than the justice of the interference; that a husband forfeits his right to sue others for enticement, where his own misconduct justified and actually caused the separation; but that otherwise his remedy is complete against all persons whomsoever who have lent their countenance to any scheme for breaking up his household.

A curious case of this sort came before the Supreme Court of North Carolina in 1849. The defendant had enticed away the wife of the plaintiff. The two afterwards entered into an agreement that the defendant should keep the plaintiff's wife and child at his own home, and should raise, educate, and provide for the child by appropriating the portion of property formerly intended for the mother's provision; that he should not be liable for having enticed the wife away; and that the plaintiff might visit his wife and child not exceeding four or five days at a time. The wife was not made a party to the contract, though it appeared to have been made with her approval. The plaintiff afterwards rescinded the agreement, demanded his wife, and, upon refusal of the defendant to give her up, sued him in damages. The court sustained him; pronouncing the contract to be "neither in form or substance a contract for a separation, but simply a license to harbor the wife and child, securing the defendant against any legal responsibility for so doing until withdrawn." And it was further intimated that such a contract was absolutely void as against public policy.¹

§ 65. **Same Subject; Whether Wife may sue for Enticement.**—Differences of sex may account for a denial of the enticement suit to the wife, though her right to her husband's society is unquestionable. Woman claims protection where man acts for himself. Hence it is held that a wife cannot, either at common law, or under statutes not clearly enabling her, maintain an action against a third person for having, by wrongful acts,

¹ *Barbee v. Armstead*, 10 Ired. 530. 238, for a like doctrine at the civil See also 1 Burge Col. & For. Laws, law.

advice, and persuasion, induced her husband to abandon and become separate from and cease to maintain her.¹

§ 66. **Husband's Duty to render Support.** — This subject will be considered later in treating of the wife's necessities, when it will also appear that our married women's acts tend to certain changes, not so much of principle as application, by extending the liability for family supplies to property such as wives now hold to their separate use. The general rule of law is that the husband, the spouse who holds and fills the purse, is bound to provide the family support and means of living. The style of support requisite — of lodging, food, clothing, and the like — is such as befits his means and condition of life. A wife is not usually justified in leaving her husband and the common home so long as the husband treats her kindly, and provides to the extent of his ability, even though retrenchment in the style of living may be needful from one cause or another.² But reducing the wife's comforts needlessly, and from sinister motives, she may justly complain of;³ and criminal prosecution with recognizance is found to aid the common law in compelling a competent husband to support his family.⁴

It was recently held, where a husband was prosecuted on his recognizance, that if he offered to support his wife and children in his father's house, having no other house, and no means of his own, and she refused to go there on the ground that the father was intemperate and abusive, he could not be held liable for neglecting to support her.⁵

§ 67. **Wife's Duty to render Services.** — The wife's obligation to render family services is at least co-extensive with that of the husband to support her in the family, these services and the comfort of her society being in fact the legal equivalent of such support.⁶ Hence, as it is held, the wife of

¹ *Van Arnham v. Ayers*, 67 Barb. 544. But see *Breman v. Paasch*, 7 Abb. (N. Y.) N. Cas. 249.

² See *Skean v. Skean*, 38 N. J. Eq. 148.

³ *Boyce v. Boyce*, 28 N. J. Eq. 337. And see *Necessaries, post*; also *Divorce for Desertion, Cruelty, &c.*

⁴ *Ib.* See *Commonwealth v. Jones*, 90 Penn. St. 481; *People v. Bartholf*, 81 N. Y. Supr. 272.

⁵ *People v. Pettit*, 74 N. Y. 320.

⁶ *Randall v. Randall*, 37 Mich. 563, per *Cooley, J.*; *Grant v. Green*, 41 Iowa, 88.

an insane man cannot claim special compensation out of his estate for taking care of him, even though such were the express contract between herself and the guardian.¹ Doubtless it would be bad policy to permit marital services on either side, however meritorious, to become a matter for money recompense, and to strike a just balance is impossible.

§ 68. *Right of Chastisement and Correction.* — Though either spouse may be the more dangerous companion, because of greater physique, daring, recklessness, or depravity, nature gives the husband the usual advantage. In a ruder state of society the husband frequently maintained his authority by force. The old common law recognized the right of moderate correction, which, according to Blackstone, was deemed a privilege by the lower orders in his day.² The civil law went still further, permitting, in certain gross misdemeanors, violent flogging with whips and rods.³ But since the time of Charles II. the wife has been regarded more as the companion of her husband; and this right of chastisement may be regarded as exceedingly questionable at the present day. The rule of persuasion has superseded the rule of force. Few cases of importance are to be found on this subject. In England, not many years ago, where a wife sought divorce from bed and board for cruelty, it was shown that the husband had spit upon her, pushed and dragged her about the room, and once slapped her face; and upon this proof the divorce was granted.⁴ The right to inflict corporal punishment upon the wife has never been favored in this country, and its exercise would now generally justify proceedings for a divorce. Indeed, our latest State decisions emphatically deny that the right longer exists either in England or this country.⁵ It may be added that the wife should not chastise

¹ Grant v. Green, 41 Iowa, 88.

² 1 Bl. Com. 444, 445. In Adams v. Adams, 100 Mass. 365, Chapman, C. J., states the old form of the writ of *supplicavit* for protection of the wife against her husband; viz. that the husband should not do other damage to her person "than what reasonably belongs to her husband for the purpose of the gov-

ernment and chastisement of his wife lawfully."

³ *Flagellis et fustibus acriter verberare uxorem.* See 1 Bl. Com. 445.

⁴ Saunders v. Saunders, 1 Rob. Ec. 549. And see Divorce for Cruelty, &c., *post*; 1 Bish. Mar. & Div. 5th ed. §§ 748, 754.

⁵ Gholston v. Gholston, 31 Geo. 625;

her husband; nor provoke harsh treatment by her own violence, foul abuse, and misconduct.¹

But either spouse may use force in self-defence. And the husband may restrain his wife from acts of violence against others as well as himself in person or property, — most certainly wherever the law makes him answerable in damages for her misbehavior;² and may prevent her unwarrantable interference with the due exercise of his parental authority.

§ 69. **Husband's Right of Gentle Restraint.** — The right of gentle restraint over the wife's person rests upon better authority than that of chastisement. This right, however, depends upon the proposition that the husband is *dignior persona*. And its exercise is often to be justified in the courts on the same grounds; namely, that the husband must answer to others for his wife's conduct. Blackstone says that in case of any gross misbehavior the husband can restrain his wife of her liberty. The later expression of Kent is that he may resort to "gentle restraint."³ Strong instances for the exercise of this right occur where the wife has eloped with a libertine, and the husband wishes to bring her home; or where she purposes an elopement, and he seeks to prevent it; or, perhaps, where she goes recklessly into lewd company.⁴ Restraint may also be justified where the wife becomes insane, threatens the husband with danger, or wantonly destroys his property.⁵

So, too, the husband, by virtue of his marital authority

Pillar v. Pillar, 22 Wis. 658; *Edmonds' Appeal*, 57 Penn. St. 282; *Fulgham v. State*, 46 Ala. 143; *Owen v. State*, 7 Tex. App. 329; *Gorman v. State*, 42 Tex. 221; 1 Bish. § 754, and cases cited. In *State v. Rhodes*, 1 Phill. (N. C.) 453, the right of moderate correction was recently claimed. But the opposite rule is announced in the later case of *State v. Oliver*, 70 N. C. 60. Corporal chastisement is not justified, though the wife be drunk or insolent. *Commonwealth v. McAfee*, 108 Mass. 458; *Pearman v. Pearman*, 1 Swab. & T. 601.

¹ *Knight v. Knight*, 31 Iowa, 451, and cases *supra*; *Prichard v. Prichard*,

3 Swab. & T. 523; *Trowbridge v. Carlin*, 12 La. Ann. 882.

² 2 Kent Com. 181; *People v. Winters*, 2 Parker (N. Y. Cr.), 10; 1 Bl. Com. 445; *Richards v. Richards*, 1 Grant, 889.

³ 2 Kent Com. 181; 1 Bl. Com. 445.

⁴ So strongly does the common law detest conjugal unfaithfulness, that the husband who kills his wife or her paramour in the act of adultery is only guilty of manslaughter. See *Regina v. Kelly*, 2 Car. & K. 814.

⁵ 8 Mod. 22; 1 Stra. 477; *Price, in re*, 2 Fost. & F. 263; *State v. Craton*, 6 Ire. 164. And see 1 Bish. Mar. & Div. § 756.

over his own household, might be allowed, if not by physical force, at least by moral coercion, to regulate her movements so as to prevent her from going to places, associating with people, or engaging in pursuits, disapproved by himself on rational grounds. This doctrine has been asserted in England; and Mr. Fraser carries it to the extent of forbidding her relatives to visit her; "for," he observes, "though the wife may be very amiable, her connections may not be so."¹ But this rule is to be laid down with great caution, and it may be considered especially unpopular in America. Mr. Justice Coleridge, in an English case, observes that the husband's right must not be exercised unnecessarily or with undue severity; and that the moment the wife, by her return to conjugal duties, makes the restraint of her person unnecessary, such restraint becomes unlawful.²

Our modern doctrine is that force, whether physical or moral, systematically exerted to compel the submission of a wife in such a manner, and to such a degree, and during such a length of time, as to injure her health and threaten disease is legal cruelty.³

§ 70. *Regulation of Household, Visitors, &c.*—From the common law relation of husband and wife it follows, as our last section indicates, that the general regulation of a household is the privilege of the husband, who is its lawful head. The wife in this respect is to be viewed as his representative or executive officer, properly entrusted with domestic details, and particularly with the supervision of female menials and their work. Husbands are sometimes blameworthy in the course of such regulation for pettiness, meanness, and inconsiderateness towards their wives. And yet households differ, and legal cruelty cannot readily be predicated of such conduct further than that in divorce suits misbehavior of this kind is frequently alleged in aggravation of actual cruelty otherwise practised, and so as to give body to the latter charge. It cannot be called cruelty or a breach of marital

¹ 1 *Fras. Dom. Rel.* 459. This observation was made by Lord Stowell in *Waring v. Waring*, 2 *Hag. Con.* 153; 1 *Eng. Ec.* 210.

² *Cochrane, in re*, 8 *Dowl. P. C.* 631.

³ *Kelly v. Kelly*, L. R. 2 P. & D. 31; *Bailey v. Bailey*, 97 *Mass.* 373. See *Divorce for Cruelty, &c., post*.

duty justifying legal interference, for a married householder, however large his establishment, to take the settlement of the little bills upon himself,¹ or the hiring and discharge of the servants.

As to the question how far the wife is bound to observe the husband's directions in entertainment, the choice of visitors, the arrangement of the rooms, and so on, the English rule is still strict; or, rather, permissive of the husband's sway. The wife is expected to conform to her husband's habits and tastes, even to his eccentricities, provided her health be not seriously endangered by so doing. And though he should restrict the calling list to a certain set agreeable to himself alone, or interdict intercourse with her family, or prevent her from paying a visit to his own relatives, all of which we may well presume to be unkind and unreasonable, yet this alone is not sufficient ground for divorce.² Nor, as it has been held in this country, would divorce be granted simply because he had forbade her to attend a particular church of which she was a member.³ Modern American precedent, however, on all these points is quite scanty. And whether the husband can allege misconduct against his wife, or obtain redress on his part if she rebels against oppressive discipline of this kind, is extremely doubtful. Whims and caprices of the husband, submission to which endangers the wife's health, need not be followed, and may even be relieved against as legal cruelty;⁴ and perhaps the former should be said of constraint upon religious worship as the worshipper's conscience dictates; for the husband's right to manage his house and wife must doubtless be understood to have rational limits.

§ 71. *Custody of Children.* — The custody of children belonged at common law to the father. Blackstone observes: "A mother, as such, is entitled to no power, but only to reverence and respect."⁵ But by an English statute, passed in 1839, the court of chancery is permitted to interfere and

¹ *Evans v. Evans*, 1 Hag. Con. 85, 115.

² *Neeld v. Neeld*, 4 Hag. Ec. 268; 267.
D'Aguilar v. D'Aguilar, 1 Hag. Ec. 773; *Waring v. Waring*, 2 Hag. Con. 153; *Shaw v. Shaw*, 17 Conn. 189; *Fulton v. Fulton*, 36 Miss. 517.

³ *Lawrence v. Lawrence*, 3 Paige,

⁴ *Kelly v. Kelly*, L. R. 2 P. & D. 31; 1 *Bish.* § 758.

⁵ 1 *Bl. Com.* 458.

award the custody of children to such parent as may be deemed most suitable. Its special object was to enable married women who should be ill-treated by their husbands to assert their rights without the fear of being separated from their offspring.¹ In this country the tendency of legislation is to place the wife upon an equal footing with her husband in this respect, so that husband and wife together shall have in their children a joint interest and control, which the courts are to regard as distinct only when the welfare of these tender beings makes judicial intervention necessary.²

§ 72. *Remedies of Spouses against one another for Breach of Matrimonial Obligations.* — As no legal process can safely be enforced to compel husband and wife to live together, against the will of either, so the peace of society forbids that they should sue one another for damages for breach of the marital obligations. Here again is marriage *sui generis*, and not like other contracts. But the failure of the one to perform recognized duties may sometimes absolve the other from certain corresponding obligations. Thus, if the wife leaves her home without justifiable cause, the husband may refuse to support her.³ If the husband is cruel, or makes his home unfit for a chaste woman to live in (which is a species of cruelty), the wife may leave and compel him to support her elsewhere.⁴ This is well-recognized law. In general, however, such violation of marital obligations is effectually punishable, not by enforcing them, as in the old English suit for restitution of conjugal rights, which is not recognized in the United States, but by putting an end to the relation altogether.⁵ And it is in the modern proceedings for divorce that we now find the subject of marital obligations most frequently discussed, with, however, a bias towards the construction of the divorce statutes themselves.

¹ 2 & 3 Vict. c. 54; *Warde v. Warde*, 2 Ph. 786.

² See *Divorce, post*. In Schouler's *Domestic Relations*, under *Parent and Child*, ch. 8, the subject is considered at length, as more appropriate to that branch of the family law.

³ 2 Kent Com. 147; *Manby v. Scott*, 1 Mod. 124; 1 Bl. Com. 443.

⁴ *Houlston v. Smyth*, 8 Bing. 127. And see *post*, as to wife's necessities.

⁵ See 1 Bish. Mar. & Div. § 771; 1 *Fras. Dom. Rel.* 452; *Adams v. Adams*, 100 Mass. 365; *Briggs v. Briggs*, 20 Mich. 84; *Divorce, post*.

Husband and wife may be indicted for assault and battery upon each other.¹ This is a means of redress not unfrequently sought against cruel husbands, especially among those of low surroundings, where drunkenness is common, and religion treats divorce for cruelty with disfavor; and a husband who beats his wife inexcusably may be convicted of this offence.² So, too, the offending spouse may be bound to keep the peace. For unreasonable and improper checks upon her liberties, the wife may have relief on *habeas corpus*. But the writ is not available for the husband to secure the person of his wife, voluntarily absenting herself from his house.³

CHAPTER II.

THE SPOUSE AS A CRIMINAL.

§ 73. Coverture affecting Private Wrongs and Public Wrongs.

— We shall find the doctrine of coverture affecting the liability of a married woman for her fraud or injury, so that her husband must respond to others in damages for her.⁴ But here the private wrong and the public wrong stand contrasted. The immunity of the wife does not extend to criminal prosecutions. For, as Blackstone observes, the union is only a civil union.⁵ Or, to come more to the point, it would be cruel and unjust to punish one person for the crime of another, or even to compel the two to bear the penalty together; while it would be impolitic, as well as unjust, to allow any

¹ *Bradley v. State*, Walker, 156; *State v. Mabrey*, 64 N. C. 592; *Whipp v. State*, 34 Ohio St. 87.

² In North Carolina, where the right to moderately chastise has been so reluctantly yielded, it is admitted that if the circumstances involve malice, cruelty, or the infliction of permanent injury upon the wife, the husband may properly be convicted of assault and battery. *State v. Oliver*, 70 N. C. 60. But in this State trivial complaints

are not favored. And a sentence to imprisonment for five years in an aggravated case was lately considered a "cruel and unusual" punishment. *State v. Driver*, 78 N. C. 423.

³ *Sandiland, Ex parte*, 12 E. L. & Eq. 463. See *Adams v. Adams*, 100 Mass. 865, as to the old writ of *supplicavit* formerly issued for protection of the wife against her husband.

⁴ See Part IV. *post*.

⁵ 1 Bl. Com. 443.

relation which human beings, morally responsible, might sustain with one another to absolve either from public accountability. Here coverture as a theory contradicts itself, by leaving the wife answerable alone for her crimes, just as a single woman. The utmost the law can do is to furnish a presumption of innocence in her favor in cases where the coercion of her husband may be reasonably inferred.

§ 74. *Presumption of Husband's Coercion and Wife's Innocence.*—This indulgence of presumed innocence, it is said, is carried so far as to excuse the wife from punishment for theft, burglary, or other civil offences “against the laws of society,” when committed in the presence or by the command of her husband; but not so as to exculpate the wife for moral offences. For *mala prohibita* she is not punished, for *mala in se* she is. Such a distinction is variable and somewhat shadowy; the line seems to be drawn more wisely, if at all, between such heinous crimes as murder and manslaughter, and the lighter offences.¹ And the better opinion is, decidedly, that at the most coercion is only a presumption, which may be rebutted by evidence to the contrary.²

§ 75. *The same Subject; Presumption of Wife's Innocence applied.*—The presumption, therefore, that in the less heinous crimes committed by the wife in her husband's presence, the wife acts under the husband's coercion, may in any case be repelled by suitable proof; and when it is, the wife, as one acting *sui juris*, must be held responsible for the wrong done by her in her husband's company. This is the true rule. Husband and wife may, therefore, both be indicted and convicted of a crime where it appears that both were guilty of the offence and the wife was not coerced.³ In most of the latest cases where the wife is indicted, the presumption of coercion has been regarded as something to be easily rebutted,

¹ 2 Kent Com. 11th ed. 150; 4 Bl. Uhl v. Commonwealth, 6 Gratt. 706; Com. 28, 29, and Christian's notes; 1 Wagener v. Bill, 19 Barb. 321; cases Hawk. P. C. b. 1, ch. 1, § 9; 1 Russ. *infra*; 1 Greenl. Ev. 10th ed. § 28. Crimes, 18-24.

² 2 Kent Com. 11th ed. 150; State Mulvey v. State, 43 Ala. 316; State v. Parkerson, 1 Strobb. 169; 1 Russ. Potter, 42 Vt. 495; People v. Wright, Crimes, 22; Rex v. Martha Hughes, 38 Mich. 744; State v. Camp, 41 N. J. coram Thomson, B., 2 Lew. C. C. 229; L. 306.

especially in that numerous class of cases which relates to the illegal sale of liquors, a business in which married women frequently engage understandingly.¹ And where the crime is heinous, and the presence and command of the husband do not concur, a jury may readily find the wife independently guilty.²

A wife who committed larceny by her husband's bare command, when he was not present, has been held liable therefor;³ and our present tendency is to refuse exculpation to the wife unless the husband commanded and was near enough besides to exert his marital influence upon her participation in accomplishing the particular crime.⁴

For an indictable offence, not heinous, committed by his wife in his presence and with his knowledge, the husband may presumably be found guilty.⁵ But not, we may well conceive, where it is shown that he tried to prevent his wife from committing the crime. Nor is he liable where the act was done in his absence and apart from his marital influence; still less where it was done while he was away and contrary to his express instructions.⁶ But if the husband is so near his wife, when she commits the crime, that she is under his immediate influence for that offence, his coercion and guilt will be presumed, though he is not actually present.⁷

§ 76. *Coercion may extend to a Series of Crimes.* — In independent crimes so closely connected as stealing and receiving stolen goods, our law does not readily prosecute the husband for the one offence and the wife for the other, since this would not consist with applying the rule of coercion. Thus, it is held that a wife cannot be convicted of feloniously

¹ See *State v. Cleaves*, 59 Me. 298; *Commonwealth v. Tryon*, 99 Mass. 442; *Commonwealth v. Pratt*, 126 Mass. 462.

² Presumption of coercion rebutted in a murder case, where wife had conspired with her husband to commit robbery, *Miller v. State*, 25 Wis. 384. In *People v. Wright*, 88 Mich. 744, where a wife, participating with her husband in a robbery, throttled the victim and told him to keep still, while her husband and a confederate rifled

his pockets, a verdict of independent guilt against her was sustained.

³ *Seiler v. People*, 77 N. Y. 411.

⁴ *State v. Camp*, 41 N. J. L. 306; *State v. Potter*, 42 Vt. 495; *Commonwealth v. Lewis*, 1 Met. 151; *Commonwealth v. Feeney*, 12 Allen, 560; *Commonwealth v. Munsey*, 112 Mass. 287; *Edwards v. State*, 27 Ark. 493.

⁵ *Hensly v. State*, 52 Ala. 10.

⁶ *State v. Baker*, 71 Mo. 475.

⁷ *Commonwealth v. Munsey*, 112 Mass. 287.

receiving stolen goods from her husband.¹ Yet in a proper case both husband and wife might be prosecuted, whether this were for receiving stolen goods or for stealing.² The husband's coercion may extend, therefore, to a series of crimes perpetrated by means of his wife's agency in pursuance of his own criminal design.

§ 77. *Offences against the Property of either Spouse.* — Public policy forbids that either spouse should molest the person of the other with impunity.³ But as to the property of a spouse our law pursues a distinction. Accordingly, it is well established that the wife cannot be found guilty of stealing the goods of her husband, inasmuch as she resides with him and has possession of the goods by virtue of the marriage relation.⁴ And as to the husband, whose legal possession and control of his wife's property during wedlock is far stronger, it is held that, not even upon the ground that a certain building was his wife's separate property, can he be convicted of arson for setting it on fire.⁵

§ 78. *The same Subject; Adultery of the Wife.* — The wife's immunity from prosecution for larceny from her husband applies whether she has been guilty of adultery or not.⁶ Therefore, it is held that the adulterer who receives from the wife her husband's goods is not guilty of receiving stolen goods.⁷ But where the actual or intended adulterer, or, as we may suppose, any person with a guilty purpose, aids the wife in carrying away her husband's goods, or removes them himself, he may be indicted for the larceny.⁸ Not even an adulterer is to be deemed guilty of larceny for merely assisting the adulteress in carrying away her necessary wearing apparel⁹ or separate property.

§ 79. *Civil Suits for Damages by either Spouse.* — No cause

¹ *Regina v. Brooks*, 14 E. L. & Eq. 580. And see *Regina v. Robinson*, L. R. 1 C. C. 80. As to stolen goods concealed in a house occupied by both husband and wife, see *Perkins v. State*, 32 Tex. 109.

² *Goldstein v. People*, 82 N. Y. 231.

³ See, e. g., as to remedies for assault and battery, *supra*, § 72.

⁴ *Queen v. Kenny*, 2 Q. B. D. 307; *Lamphier v. State*, 70 Ind. 817.

⁵ *Snyder v. People*, 26 Mich. 106.

⁶ *Queen v. Kenny*, 2 Q. B. D. 307, and cases cited.

⁷ *Id.* Compare *State v. Banks*, 48 Ind. 197.

⁸ *Id.*

⁹ *State v. Banks*, 48 Ind. 197, per *Buskirk*, C. J.

of civil action, as we shall presently see, arises in favor of one spouse by reason of bodily injury committed by the other.¹

CHAPTER III.

GENERAL RIGHTS AND DISABILITIES OF THE SPOUSES.

§ 80. **Coverture and Mutual Disabilities.** — When we come to the property rights of married women and the doctrine of coverture as affecting a wife's contracts, torts, property, and the right to sue and be sued, the inequalities of the common law will be plainly seen.² In this chapter we are to observe some of the disabilities of the marriage relation which are placed upon both parties at the common law ; partly because of the want of mutuality where coverture exists ; partly from considerations of public policy.

§ 81. **Mutual Disability to contract, sue, &c.** — Thus husband and wife cannot make gifts or sales to one another during coverture, though the same parties might have done so before and in contemplation of marriage. Nor can they in other respects contract or enter into covenants with one another. Nor can one sue the other.³ But, as we shall hereafter see, equity and modern legislation introduce a different principle.

This disability of the spouses to sue one another is not merely the technical one that, under the old procedure, husband and wife must join, but is founded on the principle that husband and wife are one.⁴ There is sound policy, moreover, in discouraging the pair from making of their matrimonial bickerings a cause of action for damages against one another. However it may be, at this day, therefore, as to actions of contract, or proceedings in equity, arising out of their distinct

¹ *Phillips v. Barnet*, 1 Q. B. D. 436; changed the common law greatly as to the mutual right of suit. And see, as to modern rules, Part VI., *post*, Transactions between Husband and Wife.

² See Part IV., *post*.

³ Lord Hardwicke, in *Lanoy v. Duchess of Athol*, 2 Atk. 448; 1 Bl. Com. 442; 2 Kent Com. 129. The married women's acts in this country have

⁴ Blackburn, J., in *Phillips v. Barnet*, 1 Q. B. D. 436.

property relations, the wife has no cause of action in damages against her husband for a pure tort committed upon her person during the marriage relation, such as assault or false imprisonment. And as the objection to such actions is not merely one of procedure, the fact that she has since procured a divorce will not enable her to bring such a suit.¹

§ 82. **Mutual Disqualification as Witnesses.**—One of the most important of the mutual disabilities of the marriage state is the disqualification of husband and wife to testify as witnesses in the courts for or against one another. Blackstone places this prohibition on a technical ground,—unity of the person; for, he says, if they testify in behalf of one another, they contradict the maxim, "*Nemo propria causa testis esse debet*;" and, if against one another, that other maxim, "*Nemo tenetur se ipsum accusare*."² He also suggests interest as another ground for the rule, and this doubtless is a good one. But a more solid reason than either is that of public policy. "The happiness of the married state," says Mr. Greenleaf, "requires that there should be the most unlimited confidence between husband and wife; and this confidence the law secures, by providing that it shall be kept forever inviolable; that nothing shall be extracted from the bosom of the wife which was confided there by the husband."³

So unyielding is this rule, that mutual consent will not authorize the breach of it.⁴ Whether the suit be civil or criminal, in law or at equity, it matters not. Form yields to substance in procedure, for the sake of excluding such testimony. And after coverture has terminated by death or divorce, still the prohibition lasts as to all which took place while the relation existed.⁵ The disability of the husband is

¹ Phillips v. Barnet, 1 Q. B. D. 486; Abbott v. Abbott, 67 Me. 304.

² 1 Bl. Com. 443.

³ 1 Greenl. Evid. § 254. See also 2 Kent Com. 178-180, to the same effect. But apparently Chapman, J., in Peaslee v. McLoon, 16 Gray, 488, prefers to consider that interest, more than policy, determined the question at common law.

⁴ 1 Greenl. Evid. § 340, and cases cited; Lord Hardwicke, in Barker v. Dixie, Cas. temp. Hardw. 264; Davis v. Dinwoody, 4 T. R. 679, per Lord Kenyon; contra, Padley v. Wellesley, 3 Car. & P. 558; 2 Kent Com. 179.

⁵ Monroe v. Twistleton, cited in Averson v. Lord Kinnaird, 6 East, 192; Doker v. Hasler, Ry. & M. 198; Stein v. Bowman, 13 Pet. 223; 1 Greenl.

in this respect as great as that of the wife.¹ So far, indeed, has the prohibition been carried, that in one case, where the defendant married a witness after she had been summoned into court, she was forbidden to testify.² The rule applies alike to evidence of declarations made by husband and wife for or against one another and to their testimony in person.³ Nor is a wife a competent attesting witness to a will which contains a devise to her husband;⁴ nor one claiming, as widow, the right to administer, competent to establish her marriage.⁵ Nor are the spouses competent witnesses for or against one another in a suit for divorce on the ground of adultery, nor in proceedings for bigamy against one of them.⁶ And it is said that the law guards the marital confidence of silence as well as that of communication.⁷

§ 83. **The same Subject; Rule restricted to Bona Fide Spouses.**

— This rule of exclusion applies only to persons occupying the *bona fide* relation of husband and wife; not, of course, to a mistress, or parties in immoral cohabitation. But at the same time the courts lean kindly towards *prima facie* marriages, and make no rigid investigation.⁸ The policy of the rule is evidently to treat as privileged communications all that passes between persons supposing themselves lawfully

Evid. § 337. See also *Terry v. Belcher*, 1 Bailey, 568; *State v. Jolly*, 3 Dev. & Bat. 110; *Cruse v. Rutledge*, 81 Ill. 266; *Wood v. Shurtleff*, 46 Vt. 525; *Barnes v. Camack*, 1 Barb. 392. But see *Dickerman v. Graves*, 6 Cush. 308.

¹ See cases cited in 1 Greenl. Evid. § 334. And see *Turner v. Cook*, 38 Ind. 129; *Richards v. Burden*, 31 Iowa, 305; *Rea v. Tucker*, 51 Ill. 110; *Succession of Wade*, 21 La. Ann. 343. The wife is not competent to prove an *alibi* for her husband in a criminal prosecution. *Miller v. State*, 45 Ala. 24.

² *Pedley v. Wellesley*, 3 Car. & P. 558. The authority of this case seems, however, questionable.

³ 1 Greenl. Evid. § 341; *Alban v. Pritchett*, 6 T. R. 680; *Denn v. White*, 7 T. R. 112; *Kelly v. Small*, 2 Esp. 716; *Brown v. Wood*, 121 Mass. 137. See *Cook v. Burton*, 5 Bush, 64, as to proof by strangers.

⁴ *Sullivan v. Sullivan*, 106 Mass. 474. The Massachusetts rule is contrary to that of New York and Maine. See authorities cited in this case.

⁵ *Redgrave v. Redgrave*, 38 Md. 93.

⁶ *Marsh v. Marsh*, 29 N. J. Eq. 396; *Finn v. Finn*, 19 N. Y. Supr. 339; *People v. Houghton*, 31 N. Y. Supr. 501. But see *State v. Bennett*, 31 Iowa, 24.

⁷ *Goodrum v. State*, 60 Ga. 509.

⁸ 1 Greenl. Evid. § 339, and cases cited; 2 Stark. Evid. 400; *Bull. N. P.* 287; *Campbell v. Twemlow*, 1 Price, 81. So as to the wife of a freedman. *Hampton v. State*, 45 Ala. 82. The rule of exclusion does not extend to a mistress or the husband of one's paramour. *Dennis v. Crittenden*, 42 N. Y. 542; *Mann v. State*, 44 Tex. 642; *Hill v. State*, 41 Ga. 484; *Rickerstriker v. State*, 31 Ark. 207; *State v. Brown*, 23 La. Ann. 279.

married, and at all events not to prejudice the rights of the innocent party to an invalid marriage; but the rule has not always been carried to such an extent.

§ 84. **The same Subject; Common-law Exceptions.**—Some exceptions exist to the rule, founded mainly on considerations of public policy. Thus the wife may testify as to her forcible abduction and marriage; but in such cases she is hardly to be considered the wife.¹ In general, husband and wife can make criminal complaints and testify against one another as to personal injuries, upon a prosecution; for this the rule of self-preservation requires.² High treason also was formerly held an exception to the rule; for the allegiance due to the crown was said to be paramount to all private considerations; but this is not probably good law at the present day.³ The wife's testimony has been admitted as to some peculiar secret facts.⁴ Dying declarations of one are admissible to charge the other with murder.⁵ And in collateral proceedings, only remotely affecting their mutual interests, their evidence is admissible though it may tend to criminate or contradict or subject the other to a legal demand; as in a suit relating to a pauper settlement, where the wife's testimony tends to convict her husband of bigamy.⁶ Or, in collateral proceedings, to prove the fact that they were husband and wife at a certain time.⁷ To this we may add that the wife's declarations

¹ 2 Russ. on Crimes, 605, 606; 1 Bl. Com. 443; 1 Greenl. Evid. § 343, and cases cited in note.

² See *ib.*; and Lord Mansfield, in *Bentley v. Cooke*, 3 Doug. 422; 1 East P. C. 455. But see Lord Thurlow, in *Sedgwick v. Walkins*, 1 Ves. 49. In a prosecution against a wife and her paramour for adultery, the husband may testify against the wife. *State v. Bennett*, 81 Iowa, 24. Wife allowed to testify against husband for using instrument with intent to procure her miscarriage. *State v. Dyer*, 59 Me. 308. See also, as to assault, &c., *Mathews v. State*, 32 Tex. 117; *Goodrum v. State*, 60 Ga. 509; *Whipp v. State*, 84 Ohio St. 87; *State v. Parrott*, 79 N. C. 615.

³ 1 Greenl. Evid. § 345, and authorities cited; *contra*, 4 Bl. Com. 29.

⁴ *Rex v. Reading*, Cas. temp. Hardw. 79, 82; *Ratcliff v. Wales*, 1 Hill, 63; 1 Greenl. Evid. § 344. Husband or wife shall not prove the fact of access or non-access. *Boykin v. Boykin*, 70 N. C. 262.

⁵ *State v. Belcher*, 13 S. C. 459. And see *State v. Ryan*, 30 La. Ann. 1176.

⁶ 1 Greenl. Evid. § 342; *Fitch v. Hill*, 11 Mass. 286; *Griffin v. Brown*, 2 Pick. 308; 2 Stark. Evid. 401; *Wood v. Bibbins*, 58 Ind. 392; *Higbee v. McMullan*, 18 Kan. 133; *Fraim v. Frederick*, 32 Tex. 294.

⁷ *Leaphart v. Leaphart*, 1 S. C. n. s. 199; *Leighton v. Sheldon*, 16 Minn. 243; *Denison v. Denison*, 35 Md. 361.

may be given in evidence for or against her husband, where material, as part of the *res gestæ*; as in a suit regarding an insurance policy where she is the party insured; in an action against the husband for her board, he having turned her out of doors; and, in general, within the scope of the agency, wherever she acts purely as his agent.¹ Where several are held together for a joint offence, the wife of one is not a good witness against the others, so long as her testimony might affect her husband's case;² but if he has already been convicted or acquitted, or is not indicted at all, or the indictment against him is dismissed, or the grounds of defence for each are entirely distinct, the rule is otherwise.³ Both husband and wife may testify, after the relation has terminated, as to facts which came to each other's knowledge by means equally accessible to any person not standing in that relation; for here the same principle applies as in the case of privileged communications between attorney and client.⁴

§ 85. **The same Subject. Modern Legislative Changes.** — There have been some important changes introduced into the law of evidence in some parts of this country by statute; such as permitting interested persons to testify in their own suits.

¹ *Averson v. Lord Kinnaid*, 6 East, 188; *Walton v. Green*, 1 Car. & P. 621; *Thomas v. Hargrave*, Wright, 595, and other cases cited in note to 1 Greenl. Evid. § 342; *Fisher v. Conway*, 21 Kan. 18; *Chunot v. Larson*, 43 Wis. 536; *Trepp v. Barker*, 78 Ill. 146; *Sumner v. Cooke*, 51 Ala. 521; *Hale v. Danforth*, 40 Wis. 382.

² *Hall*, P. C. 301; *Dalt. Just.* c. 111; 1 Greenl. Evid. § 335, and notes; 1 Phil. Evid. 75 n.; *Regina v. Williams*, 3 Car. & P. 558; *Rex v. Locker*, 5 Esp. 107; *Blake v. Lord*, 16 Gray, 387; *State v. Mooney*, 64 N. C. 54; *Fincher v. State*, 58 Ala. 215; *Powell v. State*, 58 Ala. 362; *Ray v. Commonwealth*, 12 Bush, 397. As to the wife of an accomplice who testifies against accused, see *Blackburn v. Commonwealth*, 12 Bush, 181; *State v. Ludwick*, Phill. (N. C.) 401.

³ As to civil suits, where two or more defendants must rely upon the

same defence, so that proof of a good defence as to one establishes a defence as to the other, the wife of one cannot usually be heard in behalf of the other. *Stewart v. Stewart*, 41 Wis. 624; *Mercer v. Patterson*, 41 Ind. 440.

⁴ 1 Greenl. Evid. § 338; *Coffin v. Jones*, 18 Pick. 445; *Williams v. Baldwin*, 7 Vt. 506; *Cornell v. Vanartsdalen*, 4 Barr, 364; *English v. Cropper*, 8 Bush, 292; *Elswick v. Commonwealth*, 13 Bush, 155; *Spivey v. Platon*, 29 Ark. 603. So as to communications not confidential, but evidently designed to be made public. *Crook v. Henry*, 25 Wis. 569. As to the wife of a divorced spouse testifying to facts which occurred before or after the divorce, see *Croze v. Rutledge*, 81 Ill. 266. Husband of plaintiff disqualified even as to matters occurring before marriage, where suit is for breach of promise of marriage. *Collins v. Mack*, 31 Ark. 684.

Where the old doctrine prevails, the exclusion of the husband, by reason of direct interest, operates to exclude his wife likewise.¹ So the husband cannot be a witness in a controversy respecting his wife's separate estate, though in respect to other parties concerned he might be competent.² The English Evidence Act of 1853, 16 & 17 Vict. c. 83 (which has been substantially enacted in some parts of this country), renders husbands and their wives competent and compellable witnesses for each other, except in criminal cases and in cases of adultery; but neither shall be compelled to disclose communications made during marriage.³ On the whole, the pre-

¹ 1 Greenl. Evid. § 341; *Ex parte* Jones, 1 P. Wms. 610; and cf. Stat. 6 Geo. IV. c. 16, § 37.

² 1 Burr. 424, per Lord Mansfield; 12 Vin. Abr. Evidence B. And see note to 1 Greenl. Evid. § 341, with authorities cited. In various States a spouse, under statute, may be a competent witness to a greater or less extent with reference to wife's separate property. *Musser v. Gardner*, 66 Penn. St. 242; *Northern Line Packet Co. v. Shearer*, 61 Ill. 263; *Porter v. Allen*, 54 Ga. 623; *Wing v. Goodman*, 75 Ill. 159. As where the husband dealt with the wife's separate property as her agent. *Chesley v. Chesley*, 54 Mo. 347; *Menk v. Steinfort*, 39 Wis. 370. But cf. *Robison v. Robison*, 44 Ala. 227.

³ See Ed. note to 10th ed. 2 Kent Com. 181; *Stapleton v. Croft*, 10 E. L. & Eq. 455; *Barbat v. Allen*, *ib.* 596; *Alcock v. Alcock*, 12 *ib.* 354; *State v. Wilson*, 30 N. J. 77; *Farrell v. Ledwell*, 21 Wis. 182; *Peaslee v. McLoon*, 16 Gray, 488; *Metler v. Metler*, 3 C. E. Green, 270. Some of the later American cases turning largely upon the construction of statutes are, *Parsons v. People*, 21 Mich. 509; *State v. Straw*, 50 N. H. 460; *Stanley v. Stanton*, 36 Ind. 445; *Noble v. Withers*, 36 Ind. 193; *Craig v. Brendel*, 69 Penn. St. 153; *Newhouse v. Miller*, 35 Ind. 468; *Reeves v. Herr*, 59 Ill. 81; *Green v. Taylor*, 3 Hughes, 400; *Haerle v. Kreihn*, 65 Mo. 202; *State v. Brown*, 67 N. C. 470. In an action against both for the wife's

slandorous words, the wife is competent in her own behalf, and the husband for himself. *Mousler v. Harding*, 33 Ind. 176. Notwithstanding our statutes as commonly worded, a prisoner's wife is not a competent witness for or against him upon the trial of an indictment. *People v. Reagle*, 60 Barb. 527; *Wilke v. People*, 53 N. Y. 525; *Steen v. State*, 20 Ohio St. 333. Husband permitted to testify, when a substantial party to the suit, though claiming in right of his wife. *Fugate v. Pierce*, 49 Mo. 441; *Cooper v. Ord*, 60 Mo. 420. As to the competency of a wife now to testify, if agent for an absent husband, see *Magness v. Walker*, 26 Ark. 470; *Morony v. O'Laughlin*, 102 Mass. 184; *Robertson v. Brost*, 83 Ill. 116. As to competency under statute in case of tort, see *Bunker v. Bennett*, 103 Mass. 516; *Anderson v. Friend*, 71 Ill. 475. Wife of an heir held incompetent, notwithstanding statute, in a suit contesting the validity of a will. *Carpenter v. Moore*, 43 Vt. 392. Wife not protected under statute from making discovery, though it be against herself. *Metler v. Metler*, 3 C. E. Green, 270. Husband may prove the speaking of the defamatory words in an action of slander brought by himself and wife. *Duval v. Davey*, 32 Ohio St. 604; *Hawver v. Hawver*, 78 Ill. 412. Wife not competent for husband in action by latter against a stranger for carrying away husband's goods. *Hayes v. Parmelee*, 79 Ill. 563. Testimony under

vailing tendency of late years in both England and America is to regard domestic confidence or the bias of a spouse as of little consequence compared with the public convenience of extending the means of ascertaining the truth in all causes; such facilities being increased, it is believed, by hearing whatever each one has to say, and then making due allowance for circumstances affecting each one's credibility. By the modern enlargement of the wife's separate contract and property relations, moreover, the spouses are presented, not so constantly as partakers of one another's confidence, but rather as persons having adverse interests to maintain, or else as principal and agent.

liquor acts, see *Jackson v. Reeves*, 53 Ind. 231; *Snow v. Carpenter*, 49 Vt. 426. Wife's testimony may now be that of substantial party in interest as to her property, and testimony of husband that of her agent. *Quade v. Fisher*, 63 Mo. 325; *Wilcox v. Todd*, 64 Mo. 388. In statute proceedings to compel support, see *People v. Bartholf*, 31 N. Y. Supr. 272.

As to declarations of deceased spouse proved by the survivor, see *Dye v. Davis*, 65 Ind. 474; *White v. Perry*, 14 W. Va. 66.

As to testimony affecting claims against a deceased spouse's estate, see *Freeman v. Freeman*, 62 Ill. 189; *Floyd v. Miller*, 61 Ind. 224; *Dougherty v. Deeney*, 41 Iowa, 19; *Davis v. Davis*, 48 Vt. 502; *Barry v. Sturdivant*, 53 Miss. 490; *Patton v. Wilson*, 2 Lea, 101. Or where the adverse party is representative of a deceased person, see *Hunter v. Lowell*, 64 Me. 572.

A divorced wife allowed to be a competent witness in certain instances; showing her status and competency by the judgment record in the divorce suit. *Wottrich v. Freeman*, 71 N. Y. 601.

Wife held competent to prove marriage contract between herself and her deceased husband, where the legality of the marriage is in question. *Greenwalt v. McEnelley*, 85 Penn. St. 352.

As to testimony where the suit related to property held by husband and wife jointly, see *McConnell v. Martin*, 52 Ind. 434.

A statute providing for the admission of interested parties as witnesses does not *per se* remove the disqualification of husband and wife. *Lucas v. Brooks*, 18 Wall. 436; *Gibson v. Commonwealth*, 87 Penn. St. 253; *Schultz v. State*, 32 Ohio St. 276; *Gee v. Scott*, 48 Tex. 510.

If one marital party testifies for or against the other, under statute, cross-examination must be permitted, even if it compels the testimony to the opposite direction. *Ballentine v. White*, 77 Penn. St. 20; *Steinburg v. Meany*, 53 Cal. 425.

A wife cannot testify against her husband upon his trial for theft of her property. *Overton v. State*, 43 Tex. 616.

Concerning testimony as to conversations held by married parties when they were alone, the rule of the common law, encouraging their confidence, is presumed to be unchanged unless the statute is positive to that effect. *Raynes v. Bennett*, 114 Mass. 424; *Westerman v. Westerman*, 25 Ohio St. 500; *Brown v. Wood*, 121 Mass. 137; *Wood v. Chetwood*, 27 N. J. Eq. 311; *Stanford v. Murphy*, 63 Ga. 410.

PART IV.

COMMON-LAW DOCTRINE OF COVERTURE AS TO WIFE'S CONTRACTS, TORTS, AND PROPERTY.

CHAPTER I.

GENERAL INEQUALITIES STATED.

§ 86. **What each Spouse yields as to Property.** — The property rights of married women are restrained at the common law. The husband yields to his wife no participation whatever in his own property, whether acquired before or during the continuance of the marriage relation, except a certain right of inheritance to his goods and chattels, of which he can generally deprive her by his will and testament, and also dower in his real estate, which is her only substantial privilege. In return for this, she parts with all control, for the time being, over her own property, whensoever and howsoever obtained, by gift, grant, purchase, devise or inheritance; gives him outright her personal property in possession, and allows him to appropriate to himself those outstanding rights which are known as her *choses in action*, or all the rest of her personal property; parts with the usufruct of her real estate, creating likewise a possible encumbrance upon it in the shape of tenancy by the curtesy; and finally takes, if she survives him, only her real estate, such of her personal property as remains undisposed of and unappropriated, with a few articles of wearing apparel and trinkets called *paraphernalia*. She cannot restrain his rights by will. She is not allowed to administer on his personal estate in preference to his own kin-

dred, though the whole of it were once hers; while he can administer on her estate for his own benefit, and exclude her kindred altogether, even from participation in the assets. Thus unequal are the property rights of husband and wife by the strict rule of coverture. We speak not here of recent statutory benefits conferred upon the wife; nor of that relief which equity affords in permitting property to be held to the wife's separate use, and giving her a provision from her *choses in action*, when the husband seeks its aid in appropriating them to his own use; but of what is to be properly termed the common law of husband and wife.¹

§ 87. **Husband's Liability for Wife's Contracts; Wife's Immunity.**—Some recompense is afforded to the wife for the loss of her fortune, in the rule that her husband shall pay her debts contracted while a *feme sole*; that is, unmarried. And while coverture lasts he is liable for all just debts incurred in her support. He has even been held guilty of murder in the second degree when he has suffered her to die for want of proper supplies.² The wife cannot make a contract so as to bind herself; but in this, and other cases of express or implied authority, she can bind her husband, and so secure a maintenance. That which cannot be enforced by the wife as a matter of obligation is often attained at the common law in some indirect way.³ Nor can the wife sue and be sued in her own right.

§ 88. **Wife's Immunity, &c., as to Torts.**—So, too, the husband is liable civilly for the frauds and injuries of the wife, committed during coverture; being sued either alone or jointly with her, in accordance with the legal presumption of coercion in such cases. And he must respond in damages, whether she brought him a fortune by marriage or not. But as we have seen, this rule does not apply to crimes, except that the law shows the wife a certain indulgence where a similar presumption can be alleged on her behalf. On the other hand, the husband takes the benefit of such injuries as

¹ See 1 Bl. Com. 442-445, and notes, by Christian, Hargrave, and others; 2 Kent Com. 130-143; and chapters *infra*.

² Reg. v. Plummer, 1 Car. & K. 600.

³ Ch. 2, *infra*. See 1 Bl. Com. 442; 2 Kent Com. 143-149.

she may suffer, by suing with her and appropriating the compensation by way of damages to himself.¹

§ 89. **When Wife is treated as Feme Sole.**— We may add that the wife is relieved at the common law of the disabilities of coverture, and placed upon the footing of a *feme sole*, with the privilege to contract, sue and be sued, on her own behalf, in one instance, namely, where her husband has abjured the realm or is banished; for he is then said to be dead at the law.² And the necessity of the case furnishes the strongest argument for this exception. Another exception early prevailed in certain parts of England by local custom, — as that of London, — where the wife might carry on a trade, and sue and be sued in reference thereto as though single.³

CHAPTER II.

EFFECT OF COVERTURE UPON THE WIFE'S DEBTS AND CONTRACTS.

§ 90. **Husband liable for Wife's Antenuptial Debts.** — One of the immediate effects of marriage at the common law is that the husband at once becomes bound to pay all outstanding debts of his wife, — her debts *dum sola*, as they are called, — of whatever amount. This is a sort of recompense he makes for taking her property into his hands. But whether she brings him a fortune or not, his liability is not affected. She may owe large sums at the time of marriage and have nothing to offset them. She may have studiously concealed the existence of the debts from her affianced husband. But none of these considerations can avail to shield him. When married,

¹ 1 Bl. Com. 443; 2 Kent Com. 149, 150. See ch. 3.

² 1 Bl. Com. 443; 2 Kent Com. 154. See ch. 2; Separation, *post*.

³ 1 Selw. N. P. 298; Bing. Inf. 261, 262. The modern practitioner is here cautioned that the statement of the

common law in this chapter is a statement of doctrines which at the present day are found to be controlled and changed, to a great extent, by modern equity rules and legislation. See Part V., *post*.

she is married with her debts as well as her fortunes. As Blackstone observes, her husband must be considered to have "adopted her and her circumstances together."¹

This rule is moreover applied without discrimination as to individuals. An infant who marries is bound equally with an adult husband.² A second husband is liable for the debts of his wife outstanding at the close of her widowhood, whether contracted prior to the first marriage, or while living separate from her first husband, and upon a separate maintenance, or after the termination of her first coverture and subsequent to the second.³

§ 91. *Liability for Debts only while Coverture lasts.* — On the other hand, the husband remains liable for the debts of his wife *dum sola* only so long as coverture lasts. As his liability originated in the marriage, so it ceases with it. Hence if the obligation be not enforced in the lifetime of the wife, the surviving husband retains her fortune (if any) in his hands, and cannot be charged further with her debts either at law or in equity.⁴ The wife's *choses in action* still unreduced to possession at the time of her death may, however, be reached by her creditors where he has received them as her administrator, though only to the actual amount of such assets; so that this would afford them but partial relief.⁵ Nor can the husband's estate after his death be made liable for the wife's debts contracted while sole.⁶ Not even the parol promise made by the husband during coverture to pay his wife's debts *dum sola* will create an additional liability for them on his part.⁷

§ 92. *Liability for Antenuptial Debts; Hardship of Rule illustrated.* — The injustice of the rule in certain cases is obvious. Supposing a *feme sole* is worth fifty thousand dollars, and

¹ 1 BL. Com. 448; 3 Mod. 186; 2 Kent Com. 143-146; Macq. Hus. & Wife, 39-41; Heard v. Stamford, 8 P. Wms. 409; Cas. temp. Talb. 173.

² Roach v. Quick, 9 Wend. 238; Butler v. Breck, 7 Met. 164.

³ 1 T. R. 5; 7 T. R. 348; Prescott v. Fisher, 22 Ill. 390; Angel v. Felton, 8 Johns. 149.

⁴ 2 Kent Com. 144. See Ch. Ca. 295, cited § 99, *post*.

⁵ Heard v. Stamford, 8 P. Wms. 409; Cas. temp. Talb. 173; Morrow v. Whitesides, 10 B. Monr. 411; Day v. Messick, 1 Houst. 328.

⁶ Woodman v. Chapman, 1 Camp. 189; Curtton v. Moore, 2 Jones Eq. 204.

⁷ Cole v. Shurtleff, 41 Vt. 811.

owes at the time of her marriage five thousand dollars. She marries, and dies before her creditors have had time to sue her husband. Thereupon the husband retains for himself the fifty thousand dollars, and the creditors are without a remedy. Such was the character of the argument pressed upon the distinguished Lord Talbot more than a century ago in the case of *Heard v. Stamford*.¹ But his reply was as follows: "The question is, whether the husband, as such, be chargeable for a debt of his wife's, after her death, in a court of equity? As, on the one hand, the husband is by law liable to all his wife's debts during the coverture, although he did not get one shilling portion with her, and although her debts should amount to any sum whatever; so, on the other hand, it is as certain that if the debt be not recovered during the coverture, the husband is no longer chargeable as such, let the fortune he received be ever so great. The case, perhaps, may be hard, but the law hath made it so; and the alteration of it is the proper work of the legislature only."

Lord Macclesfield, still later, encountered a different objection to the common-law rule, arising from an opposite state of facts. This he endeavored to answer. It may be hard, he observes, that the husband should be answerable for the wife's debts when he receives nothing from her; but we are to set off against that hardship the rule, that if the husband has received a personal estate with the wife, and happens not to be sued during the coverture, he is not liable. He runs a hazard in being liable to the debts much beyond the personal estate of the wife; and in recompense for that hazard he is entitled to the whole of her personal estate, though far exceeding the debts, and is discharged from the debts as soon as the coverture ceases.² Constituting a right by balancing off two wrongs may seem unsatisfactory to the modern reader. Still the court decided aright; for the difficulty was in the common law itself.

§ 93. **Antenuptial Debts where Wife was Infant.** — On general principles the husband is bound for the debt of his infant wife while sole just as much as though she were an adult,

¹ *Heard v. Stamford*, 3 P. Wms. 409.

² *Thomond v. Suffolk*, 1 P. Wms. 469; 2 Kent Com. 144.

though only to the same extent as she would have been bound. Hence, where the demand is for necessities furnished her while an infant, the husband, after marriage, becomes bound to pay it, since she would have been liable if she had not married. And the infancy of the husband himself cannot be pleaded against this obligation.¹

§ 94. *Antenuptial Debts; Effect where Wife survives Husband.* — If the wife survives her husband, she becomes liable once more on her debts while sole. And this, too, though the means for extinguishing them may have already been squandered by her husband or placed beyond her reach.² Here is a third hardship. Coverture, therefore, seems to operate here as a temporary disability, and not so as to utterly merge the wife's identity. The husband becomes liable by marriage, not as the debtor, but as the husband; the remedy being suspended, or rather shifted, during coverture.

§ 95. *Antenuptial Debts; Strictly Legal Demands; Admissions by either Spouse.* — The liability of the husband for his wife's debts while sole is limited strictly to legal demands; that is, to such as she was bound to pay at the time of her marriage.³ And if a demand would not be enforceable against her remaining sole, neither is it enforceable against her husband. But the promise or part-payment of the wife cannot take a debt out of the statute of limitations as against her husband, nor can the promise or part-payment of the husband as against his wife. Nor can their admissions charge one another.⁴ Their rights in this respect are separately regarded.

§ 96. *Antenuptial Debts; Actions; Judgment, &c.* — All actions for the wife's debts while sole must be brought against husband and wife jointly, and not against either separately; and judgment obtained by disregarding this rule will be reversed on error.⁵ The object is to retain the remedy in hand

¹ *Cole v. Seeley*, 25 Vt. 220; *Anderson v. Smith*, 83 Md. 465; *Bonney v. Beardin*, 6 Bush, 84.

² *Woodman v. Chapman*, 1 Camp. N. P. 189, per Lord Ellenborough.

³ *Cowley v. Robertson*, 8 Camp. 438; *Caldwell v. Drake*, 4 J. J. Marsh. 246.

⁴ *Ross v. Winners*, 1 Halst. 366; *Sheppard v. Starke*, 8 Munf. 29; *Brown*

v. Lasselle, 6 Blackf. 147; *Moore v. Leseur*, 18 Ala. 603; *Farrar v. Bessey*, 24 Vt. 89; *Parker v. Steed*, 1 Lea, 206. But see *Lord Tenterden*, in *Humphreys v. Royce*, 1 Mood. & Rob. 140, as to admissions of the wife allowable in evidence after her death.

⁵ *Robinson v. Hardy*, 1 Keb. 281; *Drue v. Thorn*, Alleyne, 72; *Angel v.*

so that execution may be taken out against the proper party according to circumstances; for, if the husband should die pending the suit, the wife, on her survivorship, would become liable.

If judgment be recovered against a *feme sole* on her debt before she marries, and she dies before execution is taken out, having married in the mean time, her husband will be discharged from liability. But if judgment be recovered against both during coverture, and the wife dies before execution, the husband is still charged, because by the judgment the nature of the debt was altered, and it became his own debt.¹ So, too, when judgment was obtained before coverture, and *scire facias* brought upon it against husband and wife afterwards.² When judgment has been obtained for a debt of the wife while sole, and she afterwards marries, execution must in strictness be taken out against her alone, because execution must always follow the judgment.³ But if the creditor desire to charge a person who was not a party to the record, as the husband in this instance, *scire facias* should be issued so as to make him a party.⁴ This rule applies likewise where the wife marries pending the suit. The death of the wife after action has been commenced against husband and wife, and before judgment, puts an end to the suit;⁵ while, on the other hand, the death of the husband before judgment permits the suit to abate as to him, and proceed against her as survivor.⁶

The rule as laid down in England concerning the wife's personal liability on her debts *dum sola* is that coverture does

Felton, 8 Johns. 149; 7 T. R. 848; Gage v. Reed, 15 Johns. 403; Gray v. Thacker, 4 Ala. 136; Platner v. Patchin, 19 Wis. 333.

¹ 2 Bright Hus. & Wife, 8; Burton v. Burton, 5 Harring. 441; O'Brien v. Ram, 3 Mod. 186; Sid. 337; Treviband v. Lawrence, 2 Ld. Raym. 1050.

² O'Brien v. Ram, 3 Mod. 186; Taylor v. Miller, 2 Lea, 153. Mr. Bright seems to have stated this point incorrectly. See 2 Bright Hus. & Wife, 3.

³ Doyley v. White, Cro. Jac. 323; Bull. Ch. P. 28; Benyon v. Jones, 15

M. & W. 566; and see Haines v. Corliss, 4 Mass. 659; Commonwealth v. Phillipsburgh, 10 Mass. 78; Triggs v. Triggs, 2 M. & Ry. 126 n.

⁴ 2 Bright Hus. & Wife, 3, 4; Cooper v. Hunchin, 4 East, 521.

⁵ Williams v. Kent, 15 Wend. 360. For the proper procedure in case of a mortgage executed by the wife *dum sola*, and foreclosed, with a decree ordering personal judgment for a deficiency, see Platner v. Patchin, 19 Wis. 333.

⁶ Parker v. Steed, 1 Lea, 206.

not wholly relieve her from the consequences of judgment for the time being; for that both may be taken on execution; and when the wife is taken, she shall not be discharged unless it appear that she has no separate property out of which the demand can be satisfied.¹ This rule does not seem to have been recognized with such strictness in this country.² But where the wife after marriage pays a portion of her debt contracted while sole from funds derived from her separate property, it is said that the husband will be bound by the act, unless he disaffirms it within a reasonable time.³

§ 96 *a.* **Antenuptial Debts; Effect of Spouse's Bankruptcy; of Antenuptial, &c., Contract; of Special Contract.** — The English common-law courts hold that if the husband, during coverture, obtains a certificate of discharge in bankruptcy, the wife's debts *dum sola* are wiped out as well as his own.⁴ We apprehend the equity doctrine to be that though the husband be discharged, the wife's suspended liability yet remains; and this has been announced in New York.⁵ And in Maine the wife's creditors *dum sola* may have a fraudulent conveyance of her property set aside notwithstanding her husband's insolvency.⁶

So far as the rights of third parties are concerned, the liability of the husband for his wife's debts *dum sola* cannot be affected by any antenuptial contract between the two;⁷ nor of course by their agreement during coverture. The special contract of a husband with the creditor, relating to his wife's debt *dum sola*, furnishes a different cause of action to the creditor from that which arises out of the debt *dum sola* taken by itself.⁸

§ 97. **Wife's General Disability to contract; Her Contracts void.** — In respect to her disability to contract, the wife may be considered, as Mr. Bingham has remarked, worse off at

¹ Tidd, Pract. 9th ed. 1026; Sparkes v. Bell, 8 B. & C. 1; Newton v. Roe, 7 Man. & Gr. 329; Evans v. Chester, 2 M. & W. 847.

² Mallory v. Vanderheyden, 3 Barb. Ch. 9; s. c. 1 Comst. 453.

³ Hall v. Eaton, 12 Vt. 510.

⁴ Miles v. Williams, 1 P. Wms. 249; Lockwood v. Salter, 5 B. & Ad. 308.

⁵ Mallory v. Vanderheyden, 3 Barb. Ch. 9; s. c. 1 Comst. 453.

⁶ Hamlin v. Bridge, 24 Me. 145.

⁷ Harrison v. Trader, 27 Ark. 288.

⁸ Wilson v. Wilson, 30 Ohio St. 365.

The common law as to the wife's antenuptial debts is changed considerably by our modern legislation. See Part V., *post*.

the common law than infants ; for the contracts of an infant are for the most part voidable only, while those of married women are, with few exceptions, absolutely void. But the disabilities incident to these two conditions rest upon different grounds. For the disabilities attached to infancy are designed as a protection for the inexperienced against the fraudulent ; while those incident to coverture are the simple consequence of that sole or paramount authority which the law vests in the husband.¹ Common sense teaches that married women have sufficient discretion to act for themselves, and stand on a different footing from young children ; this the English law fully recognizes, irrespective of equity rules, by empowering all women to contract up to the very moment of their marriage and from the time when coverture ceases. At most it could only be said that a woman, while living in the married state, was peculiarly subject to influence from the other sex, which might be exerted to her disadvantage.

The husband may make in his own right such contracts as he pleases, as well during coverture as before. He is never presumed to act under the wife's influence.² But the wife by coverture becomes disqualified and legally irresponsible in this respect, except in the single instance where her husband is *civiliter mortuus*, as we have already stated ;³ and in certain localities where the separate trade custom applied.⁴ But otherwise her incapacity at the common law is total.⁵

§ 98. **Wife's Disability to contract illustrated.**—To illustrate the wife's disability. She cannot earn money for herself.⁶ She cannot, jointly with her husband or alone, sign or indorse a promissory note, so as to bind herself ;⁷ nor execute a bond or other instrument under seal ;⁸ nor purchase on her own credit ; nor agree to keep a money deposit paya-

¹ See Bing. Inf. & Cov. 181, 182, Am. ed. ; 2 Kent Com. 150 ; Schouler Dom. Rel. Infancy.

² City Council v. Van Roven, 2 McCord, 465.

³ *Supra*, § 89.

⁴ *Ib.*

⁵ 1 Selw. N. P. 298 ; Bing. Inf. 261, 262. See *post*, as to modern power to trade and earn.

⁶ Offley v. Clay, 2 Man. & Gr. 172 ; ch. 4, *post*.

⁷ Mason v. Morgan, 2 Ad. & El. 30 ; Snider v. Ridgeway, 49 Ill. 522 ; O'Daily v. Morris, 81 Ind. 111 ; Dollner v. Snow, 16 Fla. 86 ; Robertson v. Wilburn, 1 Lea, 638 ; Brown v. Orr, 29 Cal. 120 ; Tracy v. Keith, 11 Allen, 214.

⁸ Whitworth v. Carter, 48 Miss. 61 ; Huntley v. Whitner, 77 N. C. 392.

ble on demand; nor be surety for another;¹ nor otherwise make a valid contract.² She is permitted, as we shall hereafter see, to pass her real estate by joining in a deed with her husband; but when she does so she is not bound by her covenants, nor was her separate conveyance (except by some matter of record) of any effect whatsoever.³ Her covenant in a mortgage of her husband's property,⁴ or title bond, or executory contract to convey land,⁵ is equally ineffectual. A sheriff's sale of her land upon her judgment note, given as security for her husband, may be set aside as void.⁶ In all these cases the wife is considered as under the husband's dominion, and unable to act for herself.⁷

On the same principle it is held that a married woman cannot bind herself by her contract to convey estate which is devised to her in trust for sale.⁸

The executory and unacknowledged contract of a married woman, being void as a contract, cannot be supported as against her on the ground of estoppel.⁹

§ 99. **This Disability extends beyond Death of the Spouse or Divorce.** — So far is this doctrine of the wife's contract disability carried, that the agreement of a widow, after her husband's death, to pay a debt which she had contracted during

¹ *Swing v. Woodruff*, 41 N. J. L. 469; *Gosman v. Kruger*, 69 N. Y. 87.

² *Avery v. Griffiths*, L. R. 6 Eq. 606; *Tobey v. Smith*, 15 Gray, 535; *Goulding v. Davidson*, 28 Barb. 438; *Lee v. Lanahan*, 68 Me. 478. But as to separate estate and modern legislation, see *post*, Part V. Her judgment bond is void. *Schlosser's Appeal*, 68 Penn. St. 493. Likewise her warrant of attorney to confess judgment. *Swing v. Woodruff*, 41 N. J. L. 469; *Shallcross v. Smith*, 81 Penn. St. 32. But as to rights of property acquired by a married woman on the faith of a promise which she voluntarily performed, see *Walker v. Coover*, 65 Penn. St. 430.

³ 2 Bl. Com. 293, 351, 364, and notes by Chitty and others; *Robinson v. Robinson*, 11 Bush, 174; *Ferguson v. Reed*, 45 Tex. 574; *Botsford v. Wilson*, 75 Ill. 183; 2 Kent Com. 160-164; *ib.* 167, 168.

See *post*, ch. 4. Rule applied to a land patent signed by husband and wife. *Shartzer v. Love*, 49 Cal. 93.

⁴ *Kitchell v. Mudgett*, 37 Mich. 81.

⁵ *Stidham v. Matthews*, 29 Ark. 650; *Oglesby Coal Co. v. Pasco*, 79 Ill. 164.

⁶ *Doyle v. Kelly*, 75 Ill. 574.

⁷ *Marshall v. Rutton*, 8 T. R. 545; 11 East, 801; 2 B. & P. 226; 8 B. & C. 291; *Jackson v. Vanderheyden*, 17 Johns. 167; *Benjamin v. Benjamin*, 15 Conn. 347; *Ayer v. Warren*, 47 Me. 217; *Young v. Paul*, 2 Stockt. 401; *Stillwell v. Adams*, 29 Ark. 346; *Stockton v. Farley*, 10 W. Va. 171; *Savage v. Davis*, 18 Wis. 608; *Williams v. Coward*, 1 Grant Cas. 21. *Aliter*, as to modern legislation, &c., Part V.

⁸ *Avery v. Griffin*, L. R. 6 Eq. 606.

⁹ *Wood v. Terry*, 30 Ark. 385; *Oglesby Coal Co. v. Pasco*, 79 Ill. 164. But cf. *Norton v. Nichols*, 35 Mich. 148.

coverture, and which consequently was not binding upon herself, but, if at all, upon her husband, has been treated as void, on the ground that the promise was without consideration and only morally binding.¹ But in another case it was held a sufficient consideration to support a widow's promissory note that it had been given by her, out of respect for her late husband's memory, to secure a debt due by him.² As a rule, of course, the widow cannot be compelled to make good an engagement or fulfil a contract which she entered into while under the disability of coverture.³

Lord Nottingham, in a case mentioned in the old reports, once refused to absolve a husband, after his wife's death, from payment for goods which she had purchased prior to the marriage, but never paid for, there being proof that he had actually received the goods, the debt being antenuptial. His lordship declared with earnestness that he would change the law on that point.⁴ But in this case it appears that the goods did not actually come to the husband's hands until after the wife's death. And the authority of this decision has since been greatly impaired.⁵ In equity the creditors of the first husband may, where his wife was administratrix, follow the assets in the hands of a second husband, although the wife be dead; and at law during her life.⁶

The contract of a married woman, being void, is likewise unenforceable against her after divorce, notwithstanding her subsequent promise, when once more *sui juris*; for such promise is without consideration.⁷ But after the death of her spouse, or her divorce from him, her promise, founded on a new consideration, may be enforced against her.

§ 100. **Wife binds Husband as Agent; Effect of his Assent or Joinder.** — But although the wife, as such, has no power to make a contract, she is allowed at the common law to bind

¹ *Meyer v. Haworth*, 8 Ad. & El. 467; *Waul v. Kirkman*, 25 Miss. 609; *Lennox v. Eldred*, 1 Thomp. & C. 140.

² *Ridout v. Bristow*, 1 Cr. & J. 231; Tyr. 84. See also *Nelson v. Searle*, 8 Jur. 290.

³ *Ross v. Singleton*, 1 Del. Ch. 149.

⁴ *Freeman v. Goodham*, Cha. Ca. 295.

⁵ Cha. Ca. 295; 1 Eq. Cas. Abr. 60.

⁶ Cha. Ca. 80; 1 Vern. 809; 2 Vern. 61, 118; 1 Eq. Cas. Abr. 60, 61; Cro. Car. 603; 1 Roll. Abr. 35. See *Ma-gruder v. Darnall*, 6 Gill, 269.

⁷ *Putnam v. Tennyson*, 50 Ind. 456.

her husband in certain cases as his agent. Her authority may be general or special, express or implied. Blackstone says that the power of the wife to act as attorney for her husband implies no separation from, but is rather a representation of, her lord.¹ Whenever the husband expressly empowers his wife to make a contract for him, he will be bound as in the case of any other principal. And he may bind himself in like manner for any unauthorized contract proceeding from his wife as agent, by subsequent conduct on his part amounting to ratification. But greater difficulty arises in determining his liability upon contracts where the authority is not express, but only implied. How far does the law go in presuming against the husband, and what are the proper limits of an implied authority in the wife to bind him by her contracts? This is an important inquiry which we shall presently consider.

But let us premise, as a suitable conclusion from the preceding sections, that the husband may be bound in one of two ways, either upon his own contract or upon that made by the wife as his agent; and hence he may be held liable because the debt or obligation was his own, or because his wife represented him. The natural effect of his joining with her in executing a contract or instrument would be to render it his individual obligation, since he is *sui juris*;² while if she executed alone and without a suitable agency on his behalf, the obligation would be altogether void.

§ 101. **Wife's Necessaries; Foundation of Husband's Obligation.**—On the important principle of the wife's agency rests the liability of the husband, at common law, in contracts made by the wife for necessaries. It is a clear obligation which rests upon every husband to support his wife; that is, to supply her with necessaries suitable to her situation and his own circumstances and condition in life. Notwithstanding a man married unwillingly,—as, for instance, to avoid a prosecution for seduction or bastardy,—he is bound to support her.³ But though this obligation appears to rest on the foundation of natural justice, the common law assigns, as the

¹ 1 Bl. Com. 442; 2 Man. & Gr. 172;
Mizen v. Peck, 3 M. & W. 481.

² Dresel v. Jordan, 104 Mass. 497.

³ State v. Ransell, 41 Conn. 433.

true legal reason, that she may not become a burden to the community. So long as that calamity is averted, the wife has no direct claim upon her husband under any circumstances whatever; for even in the case of positive starvation she can only come upon the parish for relief; in which case the parish authorities will insist that the husband shall provide for her to the extent of sustaining life.¹ If a husband fail in this respect, so that his wife becomes chargeable to any parish, the statute 4 Geo. IV. c. 83, § 3, says that "he shall be deemed an idle and disorderly person, and shall be punishable with imprisonment and hard labor."²

And this obligation extends to the whole family, with such modifications as will be more properly noticed in treatises upon the topic of parent and child. If a man marry a widow he is not bound to maintain her children; unless he holds them out to the world as part of his own family.³ But by the statute 4 and 5 Will. IV. c. 76, § 57, the husband is required to maintain, as part of his family, any child or children, till the age of sixteen, legitimate or illegitimate, that his wife may have at the time of entering into the contract.⁴

§ 102. **Wife's Necessaries; Wife may pledge Husband's Credit** — To enforce these marital obligations the law takes a circuitous course; and the wife may secure herself from want against a cruel and miserly husband, of ample means to support her, by pledging his credit and making such purchases as are needful, on the strength of an implied authority for that purpose. Here, all other things being equal, it is presumed that she was her husband's agent; and no direct permission need be shown. Indeed, wherever the facts are clear, that those articles were actually needed, and that the husband failed to supply them, this presumption is carried so far as to control even the express orders of the husband himself. The articles for which a wife is allowed to pledge her husband's credit as his presumed agent are designated at common law as necessaries.

¹ *Rex v. Flintan*, 1 B. & Ad. 227;
Reg. v. Wendron, 7 Ad. & El. 819.

² See *Macphers. Inf.* 42, 43.

³ *Attridge v. Billings*, 57 Ill. 489.

⁴ 4 T. R. 118; *Cooper v. Martin*, 4 East, 76; *Stone v. Carr*, 8 Esp. N. P. 1; *Hall v. Weir*, 1 Allen, 261. See *Schouler Dom. Rel.; Parent & Child*.

§ 103. *Wife's Necessaries; what are such.* — The wife's necessities are such articles as the law deems essential to her health and comfort; chiefly food, drink, lodging, fuel, washing, clothing, and medical attendance. They are to be determined, both in kind and amount, by the means and social position of the married pair, and must therefore vary greatly among different grades and at different stages of society.¹ Thus a large milliner's bill might not be deemed necessities for the wife of a laborer, while a wealthy merchant would be bound to pay it. So, too, necessities to-day are not what they were fifty years ago. Nor is the ordinary test to be found in the real situation and means of the married parties; for this a tradesman cannot be expected to investigate; but in their apparent situation, the style they assume, and the establishment they maintain before the world; which every husband is supposed to regulate with sufficient prudence.² Articles, too, may be of a kind which the law pronounces necessities, and yet a wife may be so well supplied as not to need the particular articles in question, — a distinction of some consequence. The decisions in the books, relating to necessities, are therefore somewhat confusing, as might be expected; the more so since the dividing line between law and fact, in such cases, is not marked with distinctness. Sometimes the court decides whether articles are necessary, sometimes a jury. The ordinary rule is that the court shall decide whether certain articles are to be classed as necessities; while the jury may determine the question of amount, and apply this classification to the facts;³ but this rule, though seemingly precise, is found difficult in its practical application.

Among the cases we find the following articles classed as necessities for the wife: Board and lodging. Medicines, medical attendance, and reasonable expenses during illness.⁴

¹ 2 Bright Hus. & Wife, 7, 8; Ozard v. Darnford, Sel. N. P. 260; Denny v. Sargeant, 6 Car. & P. 419; Berreblock v. Michael, Cro. Jac. 257, 258; n. to 2 Kent Com. 10th ed. 146; *ib.* 188, 189; 1 Bl. Com. 442.

² Waithman v. Wakefield, 1 Camp. 120.

³ Renaux v. Teakle, 20 E. L. & Eq. 845; 1 Pars. Contr. 241; Hall v. Weir, 1 Allen, 261; Parke v. Kleeber, 87 Penn. St. 251. Raynes v. Bennett, 114 Mass. 424. Phillipson v. Hayter, L. R. 6 C. P. 88.

⁴ Harris v. Lee, 1 P. Wms. 438; Mayhew v. Thayer, 8 Gray, 172; Cothran

Furniture of a house for a wife to whom the court had decreed £880 a year as alimony.¹ Silver fringes to a petticoat and side-saddle (value £94) furnished to the wife of a serjeant-at-law.² Watches and jewelry such as befits the style of dress which the husband sanctions, especially if not wholly ornamental.³ Reasonable legal expenses incurred by a wife who had been deserted by her husband, preliminary and incidental to a suit for restitution of her conjugal rights, and in obtaining professional advice as to the proper method of dealing with tradesmen who were pressing their bills.⁴ Reasonable legal expenses in defence of a prosecution instituted against a wife by her husband,⁵ and even, in a just cause, for prosecuting him.⁶ A horse worth \$45 for the invalid wife of a miller earning \$30 per month, in order that she might take exercise as advised by a physician; the question of suitableness, however, being left to the jury.⁷ The cost of divorce proceedings, including fees of a proctor, where the wife had reasonable ground for instituting them, but not otherwise.⁸ A set of false teeth, and reasonable dentistry.⁹ Household supplies reasonable and proper for the ordinary use of a family, although the wife receives the earnings of two daughters living with her.¹⁰ Perhaps a piano.¹¹

§ 104. *Wife's Necessaries; what are not such.* — But, on the other hand, the following articles have been held not to be necessaries: Articles of jewelry for the wife of a special pleader.¹² A deed of separation.¹³ The expense of an indictment by the wife for assault.¹⁴ Counsel fees in a suit for divorce or to enforce a marriage settlement, whether the wife

v. Lee, 24 Ala. 380; Webber v. Spannhake, 2 Redf. (N. Y.) 258; Spaun v. Mercer, 8 Neb. 357.

¹ Hunt v. De Blaquiére, 5 Bing. 550.

² Skin. 349.

³ Raynes v. Bennett, 114 Mass. 424.

⁴ Wilson v. Ford, L. R. 3 Ex. 68.

⁵ Warner v. Heiden, 28 Wis. 517.

⁶ Shepherd v. Mackoul, 3 Camp. 326; Morris v. Palmer, 39 N. H. 123.

⁷ Cornelia v. Ellis, 11 Ill. 584.

⁸ Brown v. Ackroyd, 34 E. L. & Eq. 214; Porter v. Briggs, 38 Iowa, 166. But cf. § 104, post.

⁹ Freeman v. Holmes, 62 Ga. 556; Gilman v. Andrus, 28 Vt. 241.

¹⁰ Hall v. Weir, 1 Allen, 261.

¹¹ Parke v. Kleeber, 37 Penn. St. 251. But see Chappell v. Nunn, 41 L. T. 287.

¹² Montague v. Benedict, 3 B. & C. 631.

¹³ Ladd v. Lynn, 2 M. & W. 265.

¹⁴ Grindell v. Godmond, 5 Ad. & El. 755. Especially if the grounds for instituting criminal proceedings did not appear reasonable. Smith v. Davis, 45 N. H. 566.

be plaintiff or defendant.¹ Passage tickets in general to enable the wife to travel, except perhaps for a clearly needful purpose.² Medical attendance rendered, without the husband's assent, by a quack doctor;³ though when a husband disputes a bill for medical attendance on the ground of malpractice, or an unnecessary surgical operation, the burden is on him to show it.⁴ "Religious instruction," or the rent of a church pew.⁵ Articles, in short, which are extravagant and altogether beyond the husband's circumstances and degree in life.⁶

Money lent the wife for the purchase of necessities, or for other purposes however suitable, is not classed with necessities at the common law; probably because husbands do not often confer an authority liable so easily to abuse.⁷ But equity takes a view more consonant to the wants of a distressed wife, and allows the person lending the money to stand in the stead of the tradesman, and to recover if the money was actually used for necessities; thus leaving him bound, in other words, only to see that his loan is properly applied.⁸

§ 105. *Wife's Necessaries; Living together or separate.* — The husband's liability for necessities may arise in two distinct classes of cases: *first*, where the wife lives with him; *second*,

¹ *Pearson v. Darrington*, 32 Ala. 227; *Morrison v. Holt*, 42 N. H. 478; *Thompson v. Thompson*, 8 Head, 527; *Coffin v. Dunham*, 8 Cush. 404; *Shelton v. Pendleton*, 18 Conn. 417; *Johnson v. Williams*, 3 Iowa, 97; *Drais v. Hogan*, 50 Cal. 121; *Dow v. Eyster*, 79 Ill. 254; *Whipple v. Giles*, 55 N. H. 139; *Williams v. Monroe*, 18 B. Monr. 514; *Ray v. Adden*, 50 N. H. 82. Legal expenses and fees are sometimes chargeable against a husband, in cases of this sort, because the statute says so. *Thomas v. Thomas*, 7 Bush, 665; *Warner v. Heiden*, 28 Wis. 517; *Glenn v. Hill*, 50 Ga. 94.

Decisions differ; but the weight of authority is that an action at law for his fees cannot be maintained by a solicitor who prosecutes or defends on the wife's behalf against her husband. Fees and retainers for more solicitors than were needful cannot be allowed. See *Divorce, post*.

² *Knox v. Bushell*, 3 C. B. n. s. 334.

³ *Wood v. O'Kelly*, 8 Cush. 406.

⁴ *M'Clallan v. Adams*, 19 Pick. 388.

⁵ *St. John's Parish v. Bronson*, 40 Conn. 75.

⁶ *Caney v. Patton*, 2 Ashm. 140. In *Phillipson v. Hayter*, L. R. 6 C. P. 88, goods, such as a gold pencil-case, cigar-case, glove-box, scent-bottle, guitar, music, and purse, to the value of £20, were held not to be necessities chargeable against the husband, who was a clerk with a salary of £400 a year.

⁷ *Walker v. Simpson*, 7 W. & S. 88; *Stone v. McNair*, 7 Taunt. 432; *Stevenson v. Hardy*, 8 Wils. 388; *Knox v. Bushell*, 3 C. B. n. s. 334.

⁸ *Harris v. Lee*, 1 P. Wms. 482; *Walker v. Simpson*, 7 W. & S. 88; *Kenyon v. Farris*, 47 Conn. 510; *Deare v. Soutten*, L. R. 9 Eq. 151. See *Schullhofer v. Metzger*, 7 Rob. (N. Y.) 576.

where she lives separate from him. And where the wife lives with him, the husband's assent to her contract for necessities is inferred from circumstances which show authority actually conferred, or else the law supplies an assent for her benefit where he has improperly refused or neglected to provide for her wants. Where they live apart, separation is either voluntary or involuntary. Let us consider these two classes of cases separately.

I. § 106. **Wife's Necessaries; Presumption from Cohabitation; Husband's Permission.** — *First*, then, as to a husband's liability where his wife lives with him. Here we are met at the outset by the broad presumption of assent which cohabitation of itself furnishes. The simple circumstance that husband and wife are living together has been generally held sufficient, when nothing to the contrary intervenes, to raise a presumption that the wife is rightfully making such purchases of necessities as she may deem proper.¹ Whoever then supplies her in good faith, as the law has usually been understood, need inquire no further, but may send his bill to her husband. This rule is a fair one; for it is not to be supposed that a husband will go in person to buy every little article of dress or household provision which may be needful for his family. As Lord Abinger observed, a wife would be of little use to her husband in their domestic arrangements, if his interference was always to be deemed necessary.² Accordingly, if an action be brought against the husband for the price of goods furnished under such circumstances, it must be taken *prima facie* that these goods were supplied by his authority, and he must show that he is not responsible.³

The wife's contract for necessities will bind the husband to a still greater extent if the evidence warrant the inference that a more extensive authority has in fact been given.⁴

¹ 2 Bright Hus. & Wife, 6, 7; Bull. N. P. 134; Langfort v. Tyler, Salk. 118; Atkins v. Curwood, 7 Car. & P. 766. See also Dyer v. East, 1 Vent. 42; Beaumont v. Weldon, 2 Vent. 155; Montague v. Benedict, 3 B. & C. 631; Manby v. Scott, 1 Mod. 124; 1 Sid. 109; 1 Roll. Abr. 351, pl. 5; Freestone v. Butcher, 9 Car. & P. 643.

² Emmet v. Norton, 8 Car. & P. 506.

³ Clifford v. Laton, 3 Car. & P. 15, per Lord Tenterden. But see *post*, § 107; Debenham v. Mellon, L. R. 5 Q. B. D. 394.

⁴ 2 Bright Hus. & Wife, 9; cases cited in note to Filmer v. Lynn, 4 Nev. & Man. 559; M'George v. Egan, 7 Scott Cases, 112. And see § 120, *post*.

Thus the presumption which cohabitation furnishes is strengthened by proof that the wife has been permitted by the husband to purchase other articles of the same sort for the use of the household.¹ But it must be ordinarily things for what may be termed the domestic department, to which the wife's authority to bind her husband is restricted.²

But we must observe that the question is, after all, one of evidence; it turns upon the question of authority from the husband; and this presumption in the wife's favor may be rebutted by contrary testimony on the husband's behalf.³ Lord Holt says, "His assent shall be presumed to all necessary contracts, upon the account of cohabiting, *unless the contrary appear*."⁴ And in the leading case of *Montague v. Benedict*, the court observes: "Cohabitation is presumptive evidence of the assent of the husband, *but it may be rebutted by contrary evidence*; and when such assent is proved the wife is the agent of the husband duly authorized."⁵

§ 107. *Wife's Agency for Necessaries controlled by Fact of Husband's Supply.*—Not only is the husband permitted to show that articles in controversy are not such as can be considered necessities, but he may show that he supplied his wife himself or by other agents, or that he gave her ready money to make the purchase.⁶ This is on the principle that the husband has the right to decide from whom and from what place the necessities shall come, and that so long as he has provided necessities in some way, his marital obligation

¹ 1 Sid. 128; *Jewsbury v. Newbold*, 40 E. L. & Eq. 618.

² *Phillipson v. Hayter*, L. R. 6 C. P. 38.

³ *Lane v. Ironmonger*, 18 M. & W. 368.

⁴ *Etherington v. Parrott*, 1 Salk. 118. See also, to the same effect, *Holt v. Brien*, 4 B. & Ald. 252; *McCutchen v. McGahay*, 11 Johns. 281; and note by Am. editor to Bing. Inf. 187. The position assumed by Mr. Story, in his work on Contracts, that, as to the wife's necessities, "the law raises an *uncontrollable* presumption of assent on the part of the husband," is therefore incorrect. Story Contr. 2d ed. § 97.

"What the law does infer is, that the wife has authority to contract for things that are really necessary and suitable to the style in which the husband chooses to live, in so far as the articles fall fairly within the domestic department which is ordinarily confided to the management of the wife." Willes, J., in *Phillipson v. Hayter*, L. R. 6 C. P. 38. And see Bovill, C. J., *ib.*, to the same effect.

⁵ *Montague v. Benedict*, 3 B. & C. 681.

⁶ *Manby v. Scott*, 1 Sid. 109; 2 Smith's Lead. Cas. (6th Am. ed.) 469; *Etherington v. Parrott*, 2 Ld. Raym. 1006.

is discharged, whatever may be the method he chooses to adopt. Accordingly in the class of cases which we are now considering, namely, where the spouses dwell together, so long as the husband is willing to provide necessaries at his own home, he is not liable to provide them elsewhere.¹ In general, while the spouses live together, a husband who supplies his wife with necessaries suitable to her position and his own, is not liable to others for debts contracted by her on such an account without his previous authority or subsequent sanction.²

As a rule, a husband who furnishes his wife and family with necessaries, in any reasonable manner, has the right to prohibit particular persons from trusting or dealing with her on his account. Notice to this effect, properly given, will be effectual as against any presumption which cohabitation raises.³ And notice given to a tradesman's servant has been held sufficient notice to the master. But notice given in the newspapers not to trust a wife is held to be of no effect against such as have not had actual notice.⁴ Nor is a successful defence against one bill sufficient notice of prohibition against subsequent bills.⁵ In order to bind the husband for goods furnished after notice to cease furnishing, the seller must show not only that the articles he furnishes are necessaries, but that the husband failed to supply them properly.⁶

Generally, in such cases, it has been said the burden of proof is upon the husband.⁷ Such a statement, however, must be taken with caution. Cohabitation furnishes, as we have seen, a presumption of authority; but the latest English decisions go very far towards annihilating that presumption by insisting that the question of the wife's express or implied authority is purely one of fact according to the circumstances of each case, where the spouses live together. And the English court of appeals for such cases⁸ has lately confirmed

¹ *Morgan v. Hughes*, 20 Tex. 141;
Jolly v. Rees, 15 C. B. n. s. 628.

² *Seaton v. Benedict*, 5 Bing. 28.

³ *McCutchen v. McGahay*, 11 Johns.
281; *Keller v. Phillips*, 39 N. Y. 851.

⁴ *Walker v. Loughton*, 11 Fost.
(N. H.) 111.

⁵ *Ogden v. Prentice*, 38 Barb. 160.

⁶ *Barr v. Armstrong*, 56 Mo. 577.

⁷ *Tebbets v. Hapgood*, 34 N. H. 420.

⁸ *Debenham v. Mellon*, L. R. 5 Q. B.
D. 394. Doubt is thrown by this decision upon *Johnston v. Sumner*, 3 H. & N. 261.

a lower tribunal,¹ as though to dispense very considerably with the necessity of notice to tradesmen on the part of a husband who means to supply his wife properly, and at the same time prevent her from pledging his credit. The point decided, however, affects only tradesmen and others who have had no previous dealings with the wife, to which the husband's assent was given; and as to such persons it is ruled that the husband being able and willing to supply his wife with necessaries, and having actually forbidden her to pledge his credit, he cannot be held liable for what she buys, even though no notice, express or implied, has been received of the prohibition.² This decision, after all, is not directly contrary to the rules of agency, as we apprehend, but operates so as to make the wife a sort of special agent. It disposes of an idea formerly entertained by many, that the wife might pledge her husband's credit for articles termed necessaries to any one, unless the husband, by publication or otherwise, had affected the seller with notice of his dissent; and it requires those who have had no previous dealings of the kind to make inquiry, at their peril, as to the wife's actual authority or destitute condition before they rely upon it. They who have already furnished supplies to the wife on the husband's credit with his knowledge, and who have come thus within the apparent scope of her agency to bind him, may, we presume, continue doing so, until death or suitable notice of the husband's dissent operates as a revocation of that agency.

§ 108. *Wife's unauthorized Purchase of Necessaries may be ratified; Assent and Dissent.* — Another point, as we have already suggested, is available by the person who has furnished necessaries, on the general principles of agency; namely, that a husband's subsequent ratification is as good as a previous authority. So, then, if it can be shown that the husband knew his wife had ordered certain necessaries, and yet failed to rescind the purchase; or if there be proof that he knew

¹ *Jolly v. Rees*, 15 C. B. x. s. 628.

² *Debenham v. Mellon*, L. R. 5 Q. B. D. 394. The opinion of Bramwell, L. J., in this case is worthy of careful pe-

rusal. The same principle is confirmed in this country by *Woodward v. Barnes*, 43 Vt. 330. But cf. *Cothran v. Lee*, 24 Ala. 880.

she wore the articles and yet expressed no disapprobation; the law presumes approval of her contract and binds him.¹ To this principle, perhaps, may be referred the rule which Mr. Roper further states (without, however, citing any authorities), that the husband is liable whenever the goods purchased by his wife come to her or his use with his knowledge and permission, or when he allows her to retain and enjoy them; in other words, that a legal liability becomes fixed from the fact that the husband and his household take the benefit of the purchase.² But the mere fact that a husband sees his wife wearing articles purchased without authority will not charge him; the question is one of approval or disapproval, assent or dissent, and the presumption against him may be rebutted.³

The husband's dissent to his wife's purchase of necessities should be expressed in an effectual and suitable manner. Mere objection on his part is insufficient. Thus a bill for medical attendance must be paid by him, even though he objected to the visits, as long as he was present and gave no notice to the physician that the latter must look elsewhere for payment.⁴ And private arrangements between husband and wife as to the method of payment cannot affect the rights of third parties, who were entitled to notice thereof and failed to receive it.⁵ If he means, when sued in assumpsit for necessities, to defend the action as to part only, it would appear that his proper plea will be that he is not liable beyond a certain amount, and he should pay that amount into court.⁶ But if he means to dispute the charge altogether, common honesty dictates that the articles unwarrantably

¹ *Seaton v. Benedict*, 5 Bing. 28; 2 Moo. & P. 74; Parke, B., in *Lane v. Ironmonger*, 18 M. & W. 368; *Day v. Burnham*, 36 Vt. 37; *Woodward v. Barnes*, 43 Vt. 330; *Ogden v. Prentice*, 38 Barb. 160.

² 2 Rop. Hus. & Wife, 112; 2 Bright Hus. & Wife, 9. Mr. Macqueen (Hus. & Wife, note to p. 132) points out this statement of Mr. Roper with a doubt as to the authority, although he admits the justice of such a rule, on the civil-law maxim that "no one

should enrich himself at another's loss."

³ *Atkins v. Curwood*, 7 Car. & P. 756.

⁴ *Cothran v. Lee*, 24 Ala. 390.

⁵ *Ib.*; *Johnston v. Sumner*, 3 Hurl. & Nor. 261. We have seen, *supra*, § 107, that the latest English cases considerably reduce the tradesman's right of notice, as formerly understood. *Debenham v. Mellon*, L. R. 5 Q. B. D. 394.

⁶ *Emmet v. Norton*, 8 Car. & P. 506.

purchased should be restored without delay.¹ He may introduce evidence at the trial to show that the commodities in question were not necessities, inasmuch as the wife had incurred other similar debts with other parties.² In a word, the question is (in the absence of such evidence of necessity as may show an agency in law) whether there was an agency and authority in fact.³

§ 109. *Wife's Necessaries supplied upon the Wife's, or a Third Person's Credit.* — The presumption of an agency on her husband's behalf may be overcome by the fact of a purchase by the wife upon her own or some third person's credit; wherever she is really trusted as principal herself, or as the agent of some one else than her spouse; or where the third person ordered them in person.⁴

In all cases the husband will be discharged from liability where it appears that the goods were not supplied on his credit, but that the party furnishing them trusted the wife individually.⁵ She might have separate property, independently of her husband, to which the tradesman looked for payment, or a special allowance of sufficient amount might have been made her by her husband.⁶ Thus, where the husband during a temporary absence made an allowance to his wife, he was held not to be liable for necessities supplied to her, the tradesman having trusted to payment from her allowance.⁷ So if credit be given to a third party, the husband is not liable.⁸ And of course, if the tradesman has agreed not to charge him, there is no liability incurred by the husband.⁹ Though the wife be without property, the rule is the

¹ *Macq. Hus. & Wife*, 136; *Gilman v. Andrus*, 28 Vt. 241. See *Tuttle v. Holland*, 48 Vt. 542.

² *Renaux v. Teakle*, 20 E. L. & Eq. 345.

³ *Read v. Teakle*, 24 E. L. & Eq. 332.

⁴ Though as to the right of her father or any other third person to stand in place of a tradesman, under proper circumstances of necessity, see *supra*, § 104.

⁵ *Metcalfe v. Shaw*, 3 Camp. 22; *Bentley v. Griffin*, 5 Taunt. 856; *Pearson v. Darrington*, 32 Ala. 227; *Stam-*

mers v. Macomb, 2 Wend. 454; *Moses v. Forgartie*, 2 Hill (S. C.), 835; *Carter v. Howard*, 39 Vt. 106; *Bugbee v. Blood*, 48 Vt. 497.

⁶ *Levett v. Penrice*, 24 Miss. 416; *Simmons v. McElwain*, 26 Barb. 420; *McMahon v. Lewis*, 4 Bush, 138; *Weisker v. Lowenthal*, 31 Md. 413.

⁷ *Holt v. Brien*, 4 B. & Ald. 252; *Montague v. Benedict*, 3 B. & C. 631; *Harshaw v. Merryman*, 18 Miss. 106; *Renaux v. Teakle*, 20 E. L. & Eq. 345.

⁸ *Harvey v. Norton*, 4 Jur. 42.

⁹ *Dixon v. Hurrell*, 8 Car. & P. 717.

same; and it would appear that the husband may give permission to trust his wife on her separate credit without incurring liability.¹

That the wife has a separate income, that the invoices are made out to her, that the plaintiff has drawn bills of exchange upon her for part-payment of the amount due, and that she has accepted such bills in her own name, payable at her own banker's from her separate funds,—all these are circumstances which go to repel the presumption of agency and show that the wife was purchasing on her own credit with the tradesman's assent.² So is the studious concealment of the purchases from the husband's knowledge, by the tradesman and the wife, and the attempt of the latter to secure the debt by her own promissory note.³ All these are facts for the jury, and if the husband has been prejudiced in his rights by such proceedings, this is in his favor.⁴ The husband is not relieved by the single circumstance that the goods were charged on the shop books to the wife; since *prima facie* the actual credit is always supposed to be given to the husband.⁵

§ 110. *Wife's Necessaries where Husband neglects to supply.*—The usual analogies of agency may be transcended, notwithstanding the spouses live together, where the one is truly delinquent, and the other deprived of the support owing her. Wherever the husband neglects to supply his wife with necessaries, or the means of procuring them, she may obtain what is strictly needful for her support, although it be against his wishes, on the pledge of his credit. And the person furnishing the articles may sue the husband notwithstanding he has been expressly forbidden to trust her.⁶ But here the law raises a presumption of agency only for the purpose of enforcing a marital obligation. Such an agency is perhaps an

¹ Taylor v. Shelton, 30 Conn. 122.

² Freestone v. Butcher, 9 Car. & P. 643; Macq. Hus. & Wife, 185.

³ Mitchell v. Treanor, 11 Geo. 324. But see Day v. Burnham, 36 Vt. 87, which regards such connivance somewhat kindly.

⁴ Attorney-General v. Riddle, 2 Cr.

& Jer. 493; 2 Tyr. 523; Barnes v. Jarrett, 2 Jur. 988.

⁵ Jewsbury v. Newbold, 40 E. L. & Eq. 518; Godfrey v. Brooks, 5 Harring. 396; Furlong v. Hyson, 85 Me. 332.

⁶ Keller v. Phillips, 39 N. Y. 351; Cromwell v. Benjamin, 41 Barb. 558; Woodward v. Barnes, 43 Vt. 330.

agency of necessity.¹ And the tradesman or other party furnishing supplies in this case is bound to show affirmatively and clearly that the husband did not provide necessaries for his wife suitable to her condition in life.² It is held in Massachusetts, that a town may supply a wife who is in need of relief, through the neglect of her husband, and then sue him for necessaries suitable to the condition of a pauper, and no more.³ In New York, if the husband be of sufficient ability to support his wife, it would appear that she cannot be supported by the public as a pauper at all.⁴ And so in Indiana.⁵

II. § 111. *Wife's Necessaries, where Spouses live apart.* — In the *second* class of cases which we are to consider, the husband's liability for his wife's necessaries arises where they are living apart. The rule is that where the husband abandons his wife, turns her away without reasonable cause, or compels her by ill usage to leave him, without adequate provision, he is liable for her necessaries, and sends credit with her to that extent.⁶ The wife's faithfulness, on the one hand, to her marriage obligations; on the other, the husband's disregard of his own: these afford the reason of the above rule and suggest its proper limitation. The wife in such cases has an authority; but here what some have called an authority of necessity.⁷ Or we may say, rather, that the law, by a fiction, infers an agency without asking evidence which should show authority in fact, and requires the husband, under these circumstances, to maintain his wife elsewhere.

This rule suggests, then, three cases where the wife may pledge her husband's credit when they are living apart: the first, where he abandons her; the second, where he turns her

¹ Pollock, C. B., in *Johnston v. Sumner*, 3 H. & N. 261, likens the agency under such circumstances to that which the captain of a ship sometimes exercises.

² *Keller v. Phillips*, 39 N. Y. 351; *Cromwell v. Benjamin*, 41 Barb. 558; *Woodward v. Barnes*, 43 Vt. 330.

³ *Monson v. Williams*, 6 Gray, 416. And see *Rumney v. Keyes*, 7 N. H. 571.

⁴ *Norton v. Rhodes*, 18 Barb. 100.

⁵ *Commissioners v. Hildebrand*, 1 Carter, 555.

⁶ 2 Kent Com. 146, 147; 2 Bright *Hus. & Wife*, 10-12; *Snover v. Blair*, 1 Dutch. 94; *Mayhew v. Thayer*, 8 Gray, 172.

⁷ See Pollock, C. B., in *Johnston v. Sumner*, 3 Hurl. & Nor. 261.

out of doors without reasonable cause; the third, where his misconduct compels her to leave him. In the first two cases his own acts impose the necessity, and her conduct is involuntary. But in the third her conduct might be considered voluntary, though induced by his misconduct; and the rule here becomes perplexing. The doctrine of *Horwood v. Heffer*, an old case, is that the wife is not justified in leaving her husband unless she has been driven from the house by actual violence or apprehension for her personal safety; and in this case the husband was held not to be liable, since she had quitted his house because he placed a profligate woman at the head of the table.¹ This doctrine has been strongly condemned in later times, and the modern cases justly regard such studied insults as capable of legal redress. If, therefore, the husband, by his indecent conduct, renders his house unfit for a modest woman to share it, the rule now is that she may leave him, and pledge his credit elsewhere for her necessities.²

Where the wife is justified on any of the above grounds in living apart from her husband, he is not discharged from liability by showing that her contract was in fact made without his authority and contrary to his wishes. Nor will his general advertisement or particular notice to individuals not to give credit to his wife affect the case.³ The legal presumption must prevail for the wife's protection.

Nor in such cases can the husband terminate his liability for necessities supplied his wife during the separation, by a simple request on his part that she shall return.⁴ And it is clear that if he only offers to take her back upon conditions which are unreasonable and improper, his liability continues.⁵ It is the husband's duty, by some positive act, to determine his liability; though if the wife voluntarily returns, his lia-

¹ 3 Taunt. 421.

² Per Lord Ellenborough, *Liddlow v. Wilmot*, 2 Stark. 77; 1 Selw. N. P. 298, 11th ed.; per Best, C. J., *Houlston v. Smyth*, 3 Bing. 127; 10 Moo. 482; 2 Car. & P. 22; *Descelles v. Kadmus*, 8 Clarke, 51; *Hultz v. Gibbs*, 66 Penn. St. 360; *Reynolds v. Sweetser*,

15 Gray, 78; *Bazeley v. Forder*, L. R. 3 Q. B. 559.

³ *Harris v. Morris*, 4 Esp. 41; 1 Selw. N. P. 298, 11th ed.; 2 Stra. 1214. See *Black v. Bryan*, 18 Tex. 463.

⁴ *Emery v. Emery*, 1 You. & Jer. 501.

⁵ *Reed v. Moore*, 5 Car. & P. 200.

bility for necessities furnished abroad is discontinued. But in default of any amicable arrangement, he must institute proceedings in the courts with divorce jurisdiction. And until some such unequivocal act is done, a person making a proper claim in a court of law for necessities supplied to the wife may be entitled to recover against him.¹ Where the wife had good reasons for leaving, the husband is not discharged by the fact of her subsequent return from liability for necessities furnished during her justifiable absence.²

§ 112. *Wife's Necessaries; Reasons for Leaving Husband; Return.*—But the wife should have weighty and sufficient cause for leaving her husband in order to be permitted to pledge his credit abroad. In general, the same facts suffice as justify divorce from bed and board.³ But where she leaves her husband without sufficient cause and against his will, he is not liable for her maintenance elsewhere, and she cannot bind him; especially if the person furnishing goods knows that cohabitation has ceased, and makes no further inquiries.⁴

Supposing the wife leaves voluntarily and without sufficient cause, against her husband's wishes, and she afterwards returns to her husband, is he bound to receive her; and, if he refuse to receive her, can she make him liable for debts contracted thenceforth for necessities? The current of authorities is in favor of such a position, provided she conducted herself properly in her absence.⁵ Some, however, have suggested doubts as to this doctrine; for, they say, since the wife by her own voluntary act discharged the husband from

¹ *Reed v. Moore*, *supra*. See *Atkyns v. Pearce*, 2 C. B. n. s. 763.

² *Reynolds v. Sweetser*, 15 Gray, 78.

³ *Brown v. Patton*, 8 Humph. 135; *Hancock v. Merrick*, 10 Cush. 41; *Caney v. Patton*, 2 Ashm. 140; *Rea v. Durkee*, 25 Ill. 503; *Schindel v. Schindel*, 12 Md. 294; *Stevens v. Story*, 43 Vt. 327; *Barker v. Dayton*, 28 Wis. 367; *Thorpe v. Shapleigh*, 67 Me. 235.

⁴ *Brown v. Midgett*, 40 Vt. 68; *Etherington v. Parrott*, 2 Ld. Raym. 1006; *Manby v. Scott*, 1 Sid. 130;

Bailey v. Calcott, 4 Jur. 699; *Collins v. Mitchell*, 5 Harring. 369; *Bevier v. Galloway*, 71 Ill. 517; *Harttman v. Teggart*, 12 Kan. 177; *Oinson v. Heritage*, 45 Ind. 73; *Thorne v. Kathan*, 51 Vt. 520.

⁵ *Manby v. Scott*, 1 Sid. 129; 1 Mod. 131; *Child v. Hardyman*, 2 Stra. 875; *Rawlins v. Vandyke*, 3 Esp. 251; *Edwards v. Towels*, 5 Man. & Gr. 624; *Hindley v. Westmeath*, 6 B. & C. 200; *Howard v. Whetstone*, 10 Ohio, 365; *McCutchen v. McGahay*, 11 Johns. 281.

his obligation to maintain her, by unnecessarily quitting his house without his consent, it is but reasonable to say that his liability to support her afterwards should not be revived by implication without his express concurrence in consenting to his wife's return to his protection, or until cohabitation was restored by mutual agreement, or by the sentence of a court with appropriate matrimonial jurisdiction.¹ This is fair reasoning on general grounds, and applies a mutual doctrine to husband and wife; but the courts appear to have thought otherwise.

§ 113. *Wife's Necessaries where Spouses live apart, and she commits Adultery.* — But, as the reader may have inferred, if the wife elopes and then commits adultery, or if her adultery causes separation, the husband becomes relieved from her support. Her crime ought to put an end to her authority to bind the injured spouse, and it does.² In such case his refusal to take her back again will not revive his obligation to maintain her. But as forgiveness always interposes a bar to legal remedies on behalf of the injured one, he becomes once more liable for her necessaries, where he voluntarily receives her again and forgives her.³

There are cases where the marital rights and duties become more confused. Supposing the wife be turned out of doors, or, what amounts to the same thing, be forced by her husband's misconduct to leave; and she afterwards, being beyond that shelter which every wife needs, commit adultery: is he then relieved from supporting her? In *Govier v. Hancock* it was held that he was, even though his own adultery caused her departure.⁴ This was a very harsh decision. The court, however, admitted that necessaries furnished before her own adultery could be recovered from her husband. And in a subsequent case it was held that adulterous

¹ See 2 Bright *Hus. & Wife*, 13. But see 2 Bish. *Mar. & Div.* 5th ed. § 33. The husband should not be deprived of his divorce remedies.

² *Morris v. Martin*, 1 Stra. 647; *Manwaring v. Sands*, 2 Stra. 707; *Hardie v. Grant*, 8 Car. & P. 512. And see *Rex v. Flintan*, 1 B. & Ad. 227; *Hunter v. Boucher*, 3 Pick. 289; *Gill v. Read*, 5 R. I. 843; *Cooper v. Lloyd*, 6 C. B. n. s. 519.

³ *Harris v. Morris*, 4 Esp. 41; *Robinson v. Gosnold*, 6 Mod. 171; *Holt v. Brien*, 4 B. & Ald. 252; *Quincy v. Quincy*, 10 N. H. 272; *Hall v. Hall*, 4 id. 402.

⁴ 6 T. R. 608.

conduct of the wife, with the connivance of the husband, or at least without such a separation of the married pair as to make her misconduct notorious, would not, *per se*, operate as a defence and protect the husband from liability.¹ And more to the point is a case decided only a short time ago, where the husband was held liable, even though the wife had been found guilty of adultery in the divorce court; since it appeared that he also had been found guilty of adultery, so that no divorce was decreed.²

But one who harbors another man's wife for illicit purposes is a wrong-doer, and cannot recover for her maintenance, even though she had fled from her own husband's cruelty.³

§ 114. *Wife's Necessaries; Effect of receiving Wife back.* — There is a *dictum* of Lord Holt to be found in an old case (or rather in the reporter's note), which sometimes finds its way to the text-books; namely, that if a husband receives back his wife, he becomes liable for her debts contracted during the whole period of her unauthorized absence.⁴ This seems very unreasonable, where the fault was on her part. The true doctrine is, doubtless, that after such reconciliation the husband is liable upon her subsequent contracts only. And this is the rule expressly asserted in some American cases.⁵

§ 115. *Wife's Necessaries when Spouses live apart, binding herself.* — How far the wife can contract liability for necessities in her own person, when the husband is discharged by her delinquency, was considered in the case of *Marshall v. Rutton*.⁶ Lord Kenyon observed that it was not a necessary consequence of the determination of the husband's responsibility that the wife should be at liberty to act as a *feme sole*; but that the contrary was the truth; and that any persons knowing her condition, who chose to trust her, could not complain if they found themselves unable to sue her. But these

¹ Norton v. Fazan, 1 B. & P. 226.

⁵ Williams v. Prince, 8 Strobb. 490;

² Needham v. Bremner, L. R. 1 C. P. 583.

Reese v. Chilton, 28 Mis. 598; Oinson v. Heritage, 45 Ind. 73. See also Chitty

³ Almy v. Wilcox, 110 Mass. 448.

Contr. 168; Williams v. McGahay, 12 Johns. 298.

⁴ Robison v. Gosnold, 6 Mod. 171.

⁶ 8 T. R. 547.

See Bing. Inf. 190 n., Am. ed.

remarks are very cautiously put; and it seems reasonable to suppose, as Justice Buller expresses himself in the case upon which Lord Kenyon commented, that the wife would become liable therefor; certainly if she represented herself as a single woman.¹

§ 116. *Wife's Necessaries, one Spouse being in an Asylum or Prison.* — The destitute wife of a lunatic living separate from her in an asylum may yet pledge his credit for necessaries;² though not, of course, for what she does not need, as where, for example, she receives sufficient income out of his estate.³ She cannot pledge, it might seem, where he is banished or in prison, provided the law recognize her as *feme sole*;⁴ but as an agent of necessity, and to compel his marital obligation, she ought to be permitted to do so if she desires, and not unfrequently does where he is in jail or prison.⁵ If the wife be in an insane asylum, the husband is not the less liable for her support.⁶ But not where she is in prison.⁷ And it seems that under circumstances of misconduct on the wife's part the husband may compel her to assent, after her release from confinement, to live separate on an allowance, without being chargeable for her support as one who has turned his wife out of doors.⁸

§ 117. *Wife's Necessaries; Voluntary Separation; Allowance.* — But besides involuntary separation, there is the case of voluntary separation to be considered. This last, now so frequent, the law tolerates, but does not favor. The rule is, that where a husband and wife parted by mutual consent, and a suitable allowance is furnished the wife, the husband is not bound to pay any bills which she may have contracted

¹ *Cox v. Kitchin*, 1 B. & P. 339; *Childress v. Mann*, 33 Ala. 206; *McHenry v. Davies*, L. R. 10 Eq. 88. See *post*, Part V., as to wife's necessaries under modern legislation.

² *Reed v. Legard*, 4 E. L. & Eq. 523; *Shaw v. Thompson*, 16 Pick. 198.

³ *Chappell v. Nunn*, 41 L. T. n. s. 287; *Richardson v. Du Bois*, L. R. 5 Q. B. 51.

⁴ *Reeve Dom. Rel.* 86.

⁵ See *Ahern v. Easterby*, 42 Conn. 546. The husband is liable for his

wife's necessaries, even though she has been declared a *feme sole* trader. *Markley v. Wartman*, 9 Phila. 236.

⁶ *Wray v. Wray*, 33 Ala. 187. And see *Alna v. Plummer*, 4 Greenl. 258; *Wray v. Cox*, 24 Ala. 337; *Brookfield v. Allen*, 6 Allen, 585.

⁷ 2 Stra. 1122; *Bates v. Enright*, 42 Me. 105.

⁸ *Wray v. Wray*, 33 Ala. 187; *Brookfield v. Allen*, 6 Allen, 585.

as his agent.¹ It is enough that the separation be a matter of common reputation where he resides. But to this allowance two things are requisite: first, that it shall be really sufficient for the wife; second, that it shall be regularly paid. If either requirement be wanting, — a fact which the seller must ascertain at his peril, — the wife is not confined to her remedy on the deed of separation, if any, but may pledge her husband's credit. As to the first requirement, the question is not whether the wife consented to accept a certain allowance as sufficient for her support, but whether it be actually sufficient in the opinion of the jury.² As to the second, the mere covenant or contract of the husband to pay separate maintenance will not discharge him from liability for necessities; for, as was observed in a leading case, "the common law does not relieve any man from an obligation on the mere ground of an agreement to do something else in the place, unless that agreement be performed."³ But perhaps it would be held otherwise where articles of separation provide that the wife shall be paid through a trustee, and the trustee squanders or misapplies the allowance which is properly paid into his hands.⁴

Allowance of a separate maintenance will not exempt the husband from liabilities caused by his own misconduct.⁵ And where a husband compels his wife to live apart from him by his misconduct, he is liable for her necessities, notwithstanding his allowance, so long as that allowance is insufficient, and she has no proper means of support.⁶

If wife and husband part by mutual consent, and there is no allowance to the wife, it may be presumed that the wife

¹ *Dixon v. Hurrell*, 8 Car. & P. 717; *Todd v. Stokes*, 1 Salk. 116; 1 Ld. 227; *Liddlow v. Wilmot*, 2 Starkie, 77; *Raym.* 444; *Hindley v. Westmeath*, 6 B. & C. 200; *Mizen v. Pick*, 3 M. & W. 481; *Reeve v. Marquis of Conyngham*, 2 Car. & K. 444; *Calkins v. Long*, 22 Barb. 97; *Kemp v. Downham*, 5 Har- ring. 417; *Caney v. Patton*, 2 Ashm. 140; *Baker v. Barney*, 8 Johns. 72; *Mott v. Comstock*, 8 Wend. 544; *Will- son v. Smyth*, 1 B. & Ald. 801.

² *Thompson v. Harvey*, 4 Burr.

2177; *Hodgkinson v. Fletcher*, 4 Camp.

N. P. 70; *Pearson v. Darrington*, 32 Ala. 227; *Liddlow v. Wilmot*, 2 Starkie, 77; *Emmet v. Norton*, 8 Car. & P. 506.

³ *Nurse v. Craig*, 5 B. & P. 148, per *Heath, J.*; *Hindley v. Westmeath*, 6 B. & C. 200; *Lockwood v. Thomas*, 13 Johns. 248; *Kimball v. Keyes*, 11 Wend. 33.

⁴ *Calkins v. Long*, 22 Barb. 97. But see *Burrett v. Booty*, 8 Taunt. 843.

⁵ *Turner v. Rookees*, 10 Ad. & El. 47.

⁶ *Litson v. Brown*, 26 Ind. 469; *Baker v. Sampson*, 14 C. B. n. s. 383.

has the right to pledge her husband's credit, for he has not relieved himself of his marital obligation.¹ It is immaterial whether the wife's allowance be secured by deed or not, since it is the payment which discharges him.²

Here we are compelled to notice a modern departure of principle growing out of the increasing favor with which separation deeds are held. Allowance of maintenance by a formal separation deed appears under the latest English decisions to be treated with so great respect as to be deemed conclusive of the extent and method of a husband's liability for his wife's support during their separation. In other words, the separation being by mutual consent, and the allowance fixed by mutual assent at a rate which it is covenanted shall suffice for the wife's support, the wife cannot pledge her husband's credit in case that income proves insufficient for her wants.³

§ 118. *Wife's Necessaries; Legalized Separation and Alimony.*

— Where the divorce court takes jurisdiction for the purpose of legalizing a separation of spouses, judicial action upon the wife's support changes the state of the case. Alimony now becomes the regular standard of allowance for necessities; and hence the payment of alimony, even if actually insufficient for the wife's maintenance, will discharge the husband from further liability for her support.⁴ And if the alimony be insufficient, the wife should induce the court to increase it. But the husband is liable for necessities supplied to the wife before alimony is decreed, even although, as it is held, the decree afterwards direct the alimony to commence from a day preceding the supply of the necessities.⁵ One who sells to a wife living apart is chargeable with knowledge of

¹ *Ross v. Ross*, 69 Ill. 569.

² *Hodgkinson v. Fletcher*, 4 Camp. 70; *Emery v. Neighbor*, 2 Halst. 142; *Holden v. Cope*, 2 Car. & K. 437. But see *Ewers v. Hutton*, 3 Esp. 255.

³ *Eastland v. Burchell*, L. R. 3 Q. B. D. 432. *Qu.* whether the wife has any remedy afforded her under such circumstances for procuring the maintenance which it continues the husband's duty to render. *Lush, J.*, in this case

seems to rest the wife's general right to pledge her husband's credit too exclusively upon the doctrine of agency. See § 120, *post*.

⁴ *Willson v. Smyth*, 1 B. & Ad. 801.

⁵ *Keegan v. Smyth*, 5 B. & C. 375; *Mitchell v. Treanor*, 11 Geo. 324; *Dowe v. Smith*, 11 Allen, 107; *Burkett v. Trowbridge*, 61 Me. 251. See *Separation and Divorce*, *post*.

the allotment of alimony, and this applies to alimony *pendente lite*.¹

§ 119. *Wife's Necessaries; Presumptions where Spouses Live Apart; Rule of Good Faith.* — It has generally been understood that whenever husband and wife separate, under circumstances showing misconduct on the part of either, the presumption of agency changes sides. The fact of their living apart is of itself a caution to all who hold dealings with a married pair. While they cohabit it is usually for the husband to show a want of authority; when they cease to cohabit the seller must prove authority; that is to say, he must prove that the wife was in need of the goods, that the husband failed to supply her, and that the wife was not at fault. *Prima facie*, therefore, a woman living apart from her husband, upon either voluntary or involuntary separation,² has no authority to bind him.³ This contrast of presumptions is subject to the new English doctrine lately commented upon, which seems to put all new tradesmen on their guard in their first dealings with a married woman.⁴

Where the husband is merely absent from home for temporary purposes, the wife's presumed authority continues.⁵ And where the fact of separation is not commonly known, or where by occasional visits the husband keeps up the appearance of cohabitation with his wife, he has generally been considered *prima facie* liable as before;⁶ though notice of an allowance is notice of his dissent to the wife's contracts.⁷ He may agree with the wife's tradesman, while living apart from her, that the goods supplied shall not be charged to him; and to such special agreement the tradesman will be held.⁸

¹ Hare v. Gibson, 32 Ohio St. 83.

² Johnston v. Sumner, 3 Hurl. & Nor. 261, per Pollock, C. B., and authorities there commented upon.

³ Etherington v. Parrott, 2 Ld. Raym. 1006; Mainwaring v. Leslie, 1 Mood. & Malk. 18; Montague v. Benedict, 8 B. & C. 631; per Lord Tenterden, Clifford v. Laton, Mood. & Malk. 101; 8 Car. & P. 16; Bird v. Jones, 3 M. & R. 121; Walker v. Simpson, 7 W. & S. 83; Mitchell v. Treanor, 11 Geo. 324; Rea v. Durkee, 25 Ill. 508;

Pool v. Everton, 5 Jones, 241; Porter v. Bobb, 25 Mis. 36; Stevens v. Story, 43 Vt. 327; Sturtevant v. Starin, 19 Wis. 268.

⁴ *Supra*, § 107; Debenham v. Mellon, L. R. 5 Q. B. D. 394.

⁵ Frost v. Willis, 18 Vt. 202.

⁶ Rawlins v. Vandyke, 3 Esp. 250, per Lord Eldon.

⁷ Hinton v. Hudson, Freem. 248; Kimball v. Keyes, 11 Wend. 33.

⁸ Dixon v. Hurrell, 8 Car. & P. 717.

Courts will always regard the rule of good faith in matters relative to the wife's necessities. Thus if the husband and wife be living apart without the husband's fault, and he wishes to terminate his liability by requesting her to return home, his conduct must show sincerity; though, if his intentions are *bona fide*, and he makes suitable provision at his own home, the wife forfeits all claim to further support by refusing to return.¹ So where a husband expels his wife and afterwards designedly misleads her into the belief that he is dead, whereupon she marries another with honest motives, and leaves him at once on learning that her husband is alive, her husband cannot set up her bigamy as a defence to an action against him for her subsequent necessities.²

§ 120. **Modern Rule of Wife's Necessaries summed up.**—The common-law doctrine, as we have seen, makes the ground of the husband's liability for his wife's necessities essentially that of agency. This agency is stated as an agency of necessity where a deserving wife stands in want of supplies because of her husband's misconduct. But in truth such necessity transcends all the analogies of an authorized representation, and inasmuch as the wife has no property and is legally dependent on her husband, a right to supply her wants upon his credit is inferred from the nature of her situation. When both spouses live together, the wife may pledge her husband's credit for necessities, unless he supplies them otherwise, and so performs his duty after his own method; if they separate, his liability continues commensurate with his obligation, so that she can only pledge his credit when the fault was not her own, but, being justified in her conduct, the conjugal right to necessities is perfect, and consequently enforceable in this manner, unless he performs his duty after his own method. The discrepancy of the cases relates chiefly to presumptions in favor of the person who supplies the necessities; and here, as we have seen, the latest decisions leave it in doubt how strong a presumption cohabitation as husband and wife furnishes by itself. Formerly it was thought that private arrangements between husband and wife, where they lived together, could

¹ Walker v. Loughton, 11 Foster, 111.

² Cartwright v. Bate, 1 Allen, 514.
See Pidgin v. Cram, 8 N. H. 350.

not be set up against the seller who had no notice thereof; but latterly the English inclination has been, as we have seen,¹ to limit the implied agency of the wife during cohabitation to those whose dealings have already been recognized by the husband, and who therefore ought to have notice of revocation, which rule of course narrows down the presumption. Whatever presumption of authority may be inferred from cohabitation, separation raises the counter-presumption that the wife has no authority to pledge her husband's credit. Upon the whole, to reconcile the earlier and later decisions, the wife's right of procuring necessities on her husband's credit may be deduced from these two combined considerations: (1) That where the husband proves remiss in furnishing needful support, the wife has the right to compel such support by pledging his credit, whether they cohabit or dwell apart, so long as misconduct on her part has not absolved him from the conjugal duty, — this rule of compulsion taking largely the place in modern times of the old remedies formerly pursued in the ecclesiastical courts; (2) That any wife may be the agent of her husband and bind him to the extent of her authority, like other representatives. In short the rule of agency and a wife's necessities is carried far enough in actual practice to make that agency a fiction for the sake of a wife's self-protection against her unfaithful spouse.²

We may add that the husband's express contract with others, or his express promise or express sanction comes in aid of such legal inference concerning his liability for supplies furnished his wife, as may be drawn from any of the matrimonial situations which we have considered.³

¹ *Supra*, § 107.

² That agency is not the full measure of the wife's power to bind her husband for what she needs is further seen in the decisions upon the point of a wife's legal expenses already noticed. *Supra*, §§ 103, 104. Here there is some confusion in the decisions; but a disposition very clear is shown by the courts to allow the wife in numerous instances to prosecute or defend in furtherance of her marital rights, even though it be against the husband himself. Incon-

sistently enough, the fiction of agency and necessities has been here employed; but the true ground is rather that the wife is permitted to maintain her rights against an unfaithful husband in self-protection. The English courts included articles of peace against the husband under necessities. *Supra*, § 108. But they stopped short at indictment of the husband for assault. *Supra*, § 104.

³ See *e. g.* *Daubney v. Hughes*, 60 N. Y. 187. Any notice intended to ter-

§ 121. **Wife's Necessaries; Marriage Reputed or de Facto sufficient.** — Marriage *de facto*, or reputed marriage, is always sufficient to charge the husband with his wife's necessaries. There seem to be three reasons why this should be so: one, that a tradesman cannot be expected to inquire into such matters; another that agency binds any principal; the third, that it is just that a man who holds out a woman to society as his wife should maintain her as such. Hence an agency is to be inferred wherever there is cohabitation of parties as husband and wife; though not, it would appear, where the cohabitation is irregular and calculated to raise a different impression, and strong proof of actual authority bestowed is not furnished. Lord Kenyon used very strong language to this effect in *Watson v. Threlkeld*, where it appeared that the tradesman knew that there had been no marriage: "It is certain that if a man has permitted a woman to whom he was not married to use his name and pass for his wife, and in that character to contract debts, he is liable for her debts; and I am of opinion that he is liable whether the tradesman who furnished the goods knew the circumstances to be so or not. He gives her a credit from his name and cohabitation; and it is not to be supposed that the tradesman could look to the credit of a woman of that description and not to that of the man by whom she was supported."¹ The *dictum* of Lord Ellenborough, in *Robinson v. Nahon*, would seem to narrow this rule so as to exclude tradesmen having actual knowledge of the illicit relation of the parties.² And the death of the *quasi* husband is held to revoke his authority altogether, so that a subsequent contract is void against his estate, under all circumstances.³

§ 122. **Wife's Necessaries; where One Spouse is a Minor.** — An adult husband is bound on the contracts of his minor wife

minate the continuance of an express contract must, in order to be effectual, be appropriate thereto. *Id.* And see *Mickelberry v. Harvey*, 58 Ind. 523.

¹ 2 Esp. 637. And see 1 Greenl. Evid. § 207.

² 1 Camp. 245. But reference to the case shows that this doubt is suggested more strongly in the reporter's head-

note than in his lordship's opinion. See *Jewsbury v. Newbold*, 40 E. L. & Eq. 518; *Munroe v. De Chemant*, 4 Camp. 215.

³ *Blades v. Free*, 9 B. & C. 167; *Stinson v. Prescott*, 15 Gray, 385. But see *Ginochio v. Porcella*, 3 Bradf. Sur. 277. See also *post*, as to dissolution of marriage by death.

for necessaries.¹ And a minor husband is liable for necessities furnished his wife, whether she be minor or adult.² The ordinary rules of husband and wife, therefore, apply so far as such necessities are concerned. If old enough to contract marriage, an infant is presumed old enough to pay for his wife's board and lodging as well as his own. And such claims may be enforced against his estate, though he die under age.³ But with regard to his wife's general contracts it would seem that infancy, which incapacitates him from making contracts in person, also disqualifies him from employing an attorney.

§ 123. **Family Necessaries; Children; Relatives.** — As an agent duly authorized, the wife may doubtless pledge her husband's credit for the necessities of the children, as well as her own. But upon the doctrine of presumptions and an implied authority from him to do so, the common law is more reserved. "Family necessities" is an expression of our later statutes which indicates a growing favor in that direction, and modern custom may, of course, extend the implied scope of an agency beyond earlier usage. There never was a doubt, in our law, of the obligation which rests upon the father of maintaining his children;⁴ and it has sometimes been considered that in a strong case, where the father neglects his duty, the infant child himself may bind the parent by his contract.⁵ We shall examine this point hereafter in the light of modern legislation,⁶ but may here remark that a wife's authority is more favored in this respect now than formerly, and that upon circumstances showing that the husband remitted the marital care and custody of children to the wife, she has been treated as an implied agent on his behalf for their necessities; and even as an agent of necessity.⁷

¹ *Nicholson v. Wilborn*, 18 Geo. 467.

² *Cantine v. Phillips*, 5 Harring. 428.
And see *Bush v. Lindsey*, 14 Geo. 687.

³ *Ibid.*

⁴ *Supra*, § 101.

⁵ See *Schouler Dom. Rel., Parent and Child*, 327, 328, where this point is considered at length.

⁶ Part V., *post*. And see *Cook v.*

Ligon, 54 Miss. 388; *Powers v. Russell*, 28 Mich. 179.

⁷ As where they have separated upon the mutual understanding that she may take the children with her. *Gotts v. Clark*, 78 Ill. 229; *Clark v. Cox*, 32 Mich. 204. Or, perhaps, where he drives wife and children from home by his misbehavior. *Reynolds v. Sweet-*

As the obligation of a husband to support does not extend beyond his wife and own children, nor even to step-children, a wife cannot ordinarily make a binding contract to support her own parent, brother, sister, or near relatives, either at his expense or her own, since she is neither *sui juris* nor presumably his agent for that purpose.¹

§ 124. **Wife's Necessaries; Parental Claims.** — Policy has regarded parental claims for necessities furnished to a wife with great distrust. Such claims may doubtless accrue under an express contract.² But the law will not ordinarily imply a contract as against a son-in-law, to pay his wife's board while staying at her father's house. "Persons in such a near connection as father and children do not usually live together upon a footing of obligation to account with and pay for attentions and services, or board and lodging. When the parties intend to live in that way, it is but reasonable to require that there should be an express understanding between them to that effect."³ And this principle is extended to the husband's own board; the law implying no contract by which the relation of debtor and creditor arises between father-in-law and son-in-law, either for support on the one hand or services on the other.⁴ It is even held that in the absence of the husband's request or promise to pay, the father of a married woman, who has left such husband ready and willing to support her, cannot recover from the husband for her board or necessities, even though she has brought a libel for divorce;⁵ though such claims, when *bona fide*, have been sustained where the wife is shown to have sought refuge at the parental abode, from the husband, upon grounds wholly justifiable.⁶ Some of the latest cases, nevertheless, imply a promise on the husband's part to pay his wife's board, where she goes to her parent's house upon a mutual understanding

ser. 15 Gray, 78; *Bazeley v. Forder*, L. R. 3 Q. B. 559.

¹ *Olney v. Howe*, 89 Ill. 556; *Attridge v. Billings*, 57 Ill. 489; *supra*, § 101. Cf. *Schnuckle v. Bierman*, 89 Ill. 454.

² *Daubney v. Hughes*, 60 N. Y. 187.

³ Per Court, in *Cantine v. Phillips*, 5 Harring. 428.

⁴ *Sprague v. Waldo*, 38 Vt. 139.

⁵ *Catlin v. Martin*, 60 N. Y. 393. The wife should, rather, apply for an allowance pending the libel.

⁶ *Biddle v. Frazier*, 3 Houst. 258. Even though the wife's libel for divorce was prosecuted under her father's direction. *Dowe v. Smith*, 11 Allen, 207.

that she may stay there indefinitely, the spouses having quarrelled.¹ With the growing laxity of the marriage union, the parent's intervention on a daughter's behalf against her husband, with the view of procuring her divorce, and boarding her at the husband's cost meantime, is, unhappily, becoming far more common than formerly, and more readily encouraged by the courts.

§ 125. *Wife's own Claims for Necessaries; Raising Funds, &c.* — Nor is a wife's own claim against her husband for moneys expended in procuring necessaries favorably regarded. Thus, if she leaves her spouse for good cause, and lives apart from him for many years, she ought either to pledge his credit, leaving the creditor to his own remedies, or else to institute such judicial proceedings as may result in the award of alimony or a separate maintenance; but not to expect to render her husband a debtor to herself.²

The wife ought not, without authority, to raise money by disposing of her husband's property. And the fact that a wife is left by her husband without means of support does not authorize her to give away household furniture, which he left in her possession, in payment of necessary services to herself.³ But money advanced for and applied to her support, by others, under like circumstances of abandonment, may be recovered of him in equity.⁴ And it was recently held that where a man was sent to jail for four months for an assault upon his wife, by which she was disabled from work, and he took with him all his money, leaving her no means of support, she was justified in selling, in her extremity, for a reasonable price, a cooking-stove belonging to her husband, for the strict purpose of procuring the means for the purchase of necessaries.⁵

Some of the old books raise a curious distinction: namely, that if the wife takes up goods, as silk, and before they are made into clothes, pawns them, the husband shall not pay for them; but that it is otherwise if they are made up and worn,

¹ *Burkett v. Trowbridge*, 61 Me. 251.

And see *Daubney v. Hughes*, 60 N. Y. 187.

² *Pierce v. Pierce*, 16 N. Y. Supr. 50.

³ *Edgerly v. Whalan*, 106 Mass. 307.

⁴ *Deare v. Soutten*, L. R. 9 Eq. 151.

And see *supra*, § 104.

⁵ *Ahern v. Easterby*, 42 Conn. 546.

and then pawned; for in the former case they never came to the husband's use, while in the latter they did.¹ We apprehend that the real question in such cases would be whether the articles were or were not in fact necessities; while at the same time purchases of cloth in quantities, it might be admitted, are not so clearly necessities as clothing made up for wear and worn. The practical application of this rule is in cases where the wife (being, as we have said, forbidden to borrow money for the purchase, real or ostensible, of necessities) undertakes to raise funds for her own purposes by purchasing goods and then selling or pawning them. We do not find a modern decision on this precise point.

§ 126. **Wife's Necessaries; Leading Elements; Partial Claims.**—The reader has perceived that the claim for a wife's necessities involves two elements: articles furnished must be of the suitable class, such as food, dresses, or medical attendance; and, furthermore, of that class the wife must be destitute of such supply as befits her condition and the means and station of her husband. Hence a blending of law and fact, and hence, moreover, much confusion in laying down the rules, though a tradesman has not always to inquire strictly. Where one has supplied the wife with articles, some of which are necessities and some are not, some of which were rightly furnished her and some of which were not, he can yet recover for the necessities, or for what he rightly furnished.² But on the other hand, one cannot furnish articles which were not necessities and not suitable, and recover a fraction of their value on the plea that they might have answered the purpose of other articles which would have been necessities.³

§ 127. **Wife's General Agency for her Husband.**—The wife may bind her husband for other contracts than those for necessities, where an agency in the premises, express or implied, can be shown. The natural incapacities of her sex superadded to those of the marriage state, the practical difficulties which persons dealing through such an agent must encounter, particularly where they find she has exceeded her authority,

¹ Holt, C. J., in *Etherington v. Parrott*, 1 Salk. 118. See also *Reeve Dom. Rel.* 84.

² *Eames v. Sweetser*, 101 Mass. 78; *Roberts v. Kelley*, 51 Vt. 97.

³ *Thorpe v. Shapleigh*, 67 Me. 235.

and yet cannot hold her liable in person, her own exposure to fraud, deceit, and coercion, — all these combine to render the wife an undesirable business representative; and cases of this sort come rarely before the courts. But the wife may be delegated an attorney, even under a sealed instrument.¹ And on principle there is little reason to doubt her capacity to bind her husband in all general transactions where he has given an express authority. So, too, her agency may be inferred from his acts and conduct respecting her; and the general rule applies that such agency is to be measured by the scope of the usual employment.² It is by virtue of such an extended agency that we find a married woman enabled frequently to pledge her husband's credit beyond all ordinary rules as to a wife's necessities.

The usual cases in which a wife binds the husband on contracts not for necessities may be reduced to two classes: the one where the nature of his employment is such that the wife is expected to share in it; the other where he is absent from home, and some one must carry on the household and small business matters.³

§ 128. *Wife's General Agency for Husband; Instances.* — Instances of the first class are those of farmers, victuallers, and small shopkeepers.⁴ While, on behalf of married women, extended authority is to be implied from the fact of a husband's absence, as in our second class, every wife will readily be regarded as her husband's representative in the ordinary household purchases, such as provisions and furniture, although the articles may not be strictly included among her

¹ *Goodwin v. Kelly*, 42 Barb. 194.

² *Cox v. Hoffman*, 4 Dev. & Batt. 180; *Mackinley v. McGregor*, 8 Whart. 369; *Camelin v. Palmer Co.*, 10 Allen, 589; *Ruddock v. Marsh*, 88 E. L. & Eq. 516; *Pickering v. Pickering*, 6 N. H. 124; *Abbott v. Mackinley*, 2 Miles, 220; *Gray v. Otis*, 11 Vt. 628; *Miller v. Delamater*, 12 Wend. 433; *Hughes v. Stokes*, 21 Hayw. 372; *Mickelberry v. Harvey*, 58 Ind. 523; *Heney v. Sargent*, 54 Cal. 396.

³ Qu. whether the wife's power to dispose of her husband's property for

necessary purposes may arise by implication from the fact of his absconding. *Butts v. Newton*, 29 Wis. 632. The doctrine of some such extended agency where the husband was in jail might support the decision in *Ahern v. East-erby*, 42 Conn. 546, referred to *supra*, § 125. From the absence of a husband in distant military or naval service may be inferred an enlargement of the wife's authority. *Buford v. Speed*, 11 Bush, 388.

⁴ See *Webster v. McGinnis*, 5 Binn. 235; *Rotch v. Miles*, 2 Conn. 638.

personal necessities. They might be called household necessities. But where the husband is a laboring man, or in general a person obliged to be absent from his home much of the time, the presumption of the wife's agency would be stronger and extend further. If the occupation be that of carrying on a farm, or if small bills are to be collected, such as he and his wife have always attended to, her powers in his absence take a still wider scope; and this too seems reasonable. Usage will go far in determining such questions. But since persons carrying on a large business, totally distinct from their household occupation, are not in the habit of employing their wives to manage it for them, strong proof of agency for such transactions should be required to warrant a wife's interference during her husband's absence; the more so if he has left other competent agents of his own to manage the business for him. So, too, in large pecuniary affairs, of whatever nature, her agency is not readily inferred; while it often is in collecting small rents and paying small bills; such payments and receipts being permitted to bind her husband. And although a wife may, by actual authority from her husband, indorse his notes, mortgage and dispose of his personal property, conduct his business as a trader, and even borrow money for carrying on his business on the pledge of his credit, signing the notes and securities in his behalf, — for all this is sometimes done, — such authority requires strict proof; or at least conduct on the part of the husband showing his own approval of such hazardous proceedings on her part.¹

The difficulty of laying down a more positive rule on this subject is shown by two cases which came before the courts

¹ *Church v. Landers*, 10 Wend. 79; 3 *Head*, 36; *Shoemaker v. Kunkle*, *Gates v. Brower*, 5 Seld. 205; *Leeds v. 5 Watts*, 107; *Gilbert v. Plant*, 18 Ind. Vail, 15 Penn. St. 185; *Alexander v. 308*. It seems that written contracts made by the wife as agent, including promissory notes, should show such authority on the face. *Minard v. Mead*, 7 Wend. 68; *Galusha v. Hitchcock*, 29 Barb. 193; 2 *Man. & Gr.* 172. A wife has no implied authority to draw her husband's money from the savings bank as his agent. *Allen v. Williamsburgh Sav. Bank*, 2 Abb. N. Cas. 342.

of two of our neighboring States, not many years since, on a presentation of facts almost identical, but where the respective decisions were precisely opposite. A farmer was absent from home. His wife had been left in charge of the farm, but without express authority from him. A creditor attached the real estate and crops; and she permitted the hay, after attachment, to be used by the officer; to the advantage of the creditor, or at least to her husband's detriment. In the Vermont case it was held that the wife had a *prima facie* authority to bind her husband; in the Connecticut case it was held that she had not. Neither of these tribunals erred in their statement of leading principles; but their duty here being rather an application of broad rules to facts, than a clearly legal deduction, they differed just as two men would have done, sitting upon a jury.¹

§ 129. *Wife's General Agency as to Personal Property of Husband.*—In accordance with the principles we have stated, it is held that where a husband permits his wife to carry on a certain business in his name, and to draw in his name checks and notes to be used in the course of the business, she cannot make him liable as surety for loans to third persons, or upon accommodation paper, merely because of such an agency.² And where her agency extends only to the performance of certain specific acts of a general transaction, she cannot bind him by her acts and admissions respecting other matters connected with the general transaction.³ The husband may, by suitable conduct, make his wife his agent for receiving settle-

¹ Felker v. Emerson, 16 Vt. 653; Benjamin v. Benjamin, 15 Conn. 847. A third person may be sued on a contract made with a married woman after she has performed her part, although she had no right to make it. Ham v. Boody, 20 N. H. 411; Lowry v. Naff, 4 Cold. 370. See 1 Greenl. Evid. § 185; Plimmer v. Sells, 3 N. & M. 422; Dodd v. Acklom, 6 M. & Gr. 678; Thrasher v. Tuttle, 22 Me. 385; Hopkins v. Molineux, 4 Wend. 465; Filmer v. Lynn, 4 N. & M. 559; Taylor v. Green, 8 Car. & P. 316; Gulick v. Grover, 4 Vroom, 468, as to the rule of evidence sufficient to show the wife's authority to manage

her husband's business. The principles of ordinary agency generally apply in such cases. See also Wharton v. Wright, 1 Car. & K. 585; Clifford v. Burton, 1 Bing. 199; Petty v. Anderson, 3 Bing. 170; Emerson v. Blountden, 1 Esp. 142.

In some States a wife acting as her husband's agent is a competent witness as to matters within the scope of such agency. Chunot v. Larson, 43 Wis. 536; *supra*, § 84.

² Gulick v. Grover, 2 Vroom, 182; 4 Vroom, 468.

³ Goodrich v. Tracy, 43 Vt. 314.

ment of claims due him while absent ;¹ or for employing legal assistance as incidental to managing his affairs.²

§ 130. *Wife's General Agency as to Real Estate.* — The wife may be her husband's agent as to his real estate, not only for the purpose of collecting rents and making small repairs, but in the more important transactions. But as deeds and written instruments are here commonly requisite, and formalities must be followed, little can be left to inference. Such authority presupposes usually a husband's long absence. Thus the management of a farm in a husband's absence, with the care of the stock, is not unfrequently entrusted to the wife.³ It is not to be presumed that a wife can revoke her husband's license on his premises, given to a third person,⁴ nor grant an irrevocable license thereon.⁵

The wife may represent her husband, not only in the general management of his own lands, so as to bind him, but, under certain circumstances, with reference to her real estate in which he has the usual marital rights, or lands owned partly by her and partly by him.⁶

§ 131. *Wife's General Agency; Ratification, &c.* — Ratification by the husband is not essential where the scope of the wife's agency was sufficient without it;⁷ but it cures acts of doubtful authority. The wife's sale or gift of her husband's personal property, even without authority, or her purchase on his behalf, may be confirmed by his subsequent acts amounting to ratification; and one mode of ratification is to accept knowingly the benefits of her transaction.⁸ Acts done by the wife in relation to her husband's property, without authority, should of course be promptly disavowed by him

¹ *Stall v. Meek*, 70 Penn. St. 181. See *Meador v. Page*, 89 Vt. 306, where a wife, in contracting a loan, was held to have acted within the scope of her apparent agency.

² *Buford v. Speed*, 11 Bush, 338.

³ *Chunot v. Larson*, 43 Wis. 536; *McAfee v. Robertson*, 41 Tex. 355. As to putting a lightning-rod on a man's house in his absence, see *Meiners v. Munson*, 53 Ind. 138.

⁴ *Kellogg v. Robinson*, 82 Conn. 335.

⁵ *Nelson v. Garey*, 114 Mass. 418.

⁶ *Cheney v. Pierce*, 38 Vt. 515; *Dresel v. Jordan*, 104 Mass. 497.

⁷ See *McAfee v. Robertson*, 41 Tex. 355.

⁸ *Dunnahoe v. Williams*, 24 Ark. 284; *Mickelberry v. Harvey*, 58 Ind. 523; *Pike v. Baker*, 53 Ill. 163; *Shaw v. Emery*, 38 Me. 484; *supra*, § 108. Even a trifling gift from the wife by way of charity has been upheld, though without the husband's permission. *Spencer v. Storrs*, 38 Vt. 156.

within a reasonable time, if he wishes to escape responsibility.¹ Nor can a husband stand by and see his wife use the proceeds of a sale of his property sold by her with his knowledge, and afterwards reclaim the property.²

§ 132. **Effect of Creditor's Marriage with the Debtor.**—A debt or obligation due a woman is extinguished, not suspended, at common law, by her marriage with the debtor or obligor, and she cannot recover the same against him or his estate after the relation is ended.³ So, too, where the woman is debtor and marries the creditor, the debt against her is discharged.⁴ These doctrines are subject to the exception that this must not affect the rights of third parties.⁵

CHAPTER III.

EFFECT OF COVERTURE UPON THE WIFE'S INJURIES AND FRAUDS.

§ 133. **Principle stated.**—Frauds and injuries may have been committed by the wife; or they may have been committed upon the wife. Again they may have been committed before coverture; or they may have been committed during coverture. Once more, they may have reference to the person; constituting a bodily injury, such as assault and battery, or an injury to the character, such as slander; or they may have reference to property. But in any event, so far as the fraud or injury is made the subject of a civil suit, the

¹ *Hill v. Sewald*, 53 Penn. St. 271.

² *Delano v. Blanchard*, 52 Vt. 578; *Huff v. Price*, 50 Mo. 228.

³ *Smiley v. Smiley*, 18 Ohio St. 548.

⁴ Indorsement or assignment of such a debt, or its evidence before marriage, may nevertheless give a third person rights against the debtor. *Guptil v. Horne*, 63 Me. 405. *Aliter*, where such indorsement or assignment takes place after the marriage. *Long v. Kinney*, 49 Ind. 235.

⁵ *Price v. Price*, L. R. 11 Ch. D.

163. Here it was said that where the woman was entitled to a bond as legal personal representative, and creditors or legatees of the estate would be prejudiced thereby, no extinguishment of the bond would take place by her marriage. *Aliter*, however, where, as here, the wife was residuary legatee, and all debts and legacies were shown to have been paid.

general principle of the wife's disability remains the same; namely, that the husband compensates or receives the compensation.

I. § 134. **Torts by the Wife; Husband and Wife sued together or Husband alone.** — We have seen that one spouse is not criminally answerable for the other.¹ But as to private wrongs or torts, the general rule of law is that the husband is liable for the frauds and injuries of the wife, whether committed before or during coverture; if committed under his coercion or by him alone, he, and he alone, is liable; otherwise, both are, for the time being, liable.² Where the fraud or injury is committed in his company and by his order, coercion is presumed, and the husband becomes, *prima facie*, the only wrong-doer; and where committed without his order and in his absence, the wife is, in reality, the offending party, while the husband has become responsible for her acts by reason of her coverture. In the latter class of cases the husband is properly joined with his wife in the suit; for if the wife alone were sued, his property might be seized without giving him an opportunity for defence; and if the husband alone were sued, he would become chargeable absolutely. In the former class of cases the husband should be sued alone.³ Where the tort is committed by both spouses, and the wife does not act by coercion, both husband and wife may be jointly sued.⁴

§ 135. **Torts by the Wife; Coercion presumed.** — This presumption of coercion, too, is much the same in civil as in criminal offences.⁵ It is said by Chancellor Kent that a wrong committed by the wife "in company with" her husband, or "by his order," renders the husband alone liable; but this

¹ *Supra*, Part III. c. 2.

² 2 Kent Com. 149; Bing. Inf. 256, 257; Angel v. Felton, 8 Johns. 149; Gage v. Reed, 15 Ill. 408; Carl v. Wonder, 5 Watts, 97; Whitman v. Delano, 6 N. H. 548; Gray v. Thacker, 4 Ala. 186; McKeown v. Johnson, 1 McCord, 578; Benjamin v. Bartlett, 8 Miss. 86; Wright v. Kerr, Addis. 18; Cassin v. Delany, 38 N. Y. 178; Ball v. Bennett, 21 Ind. 427; Marshall v.

Oakes, 51 Me. 308; Clark v. Bayer, 32 Ohio St. 299.

³ Park v. Hopkins, 2 Bailey, 411; Matthews v. Fiestel, 2 E. D. Smith, 90; Jackson v. Kirby, 37 Vt. 448.

⁴ 12 Mod. 246; Vine v. Saunders, 6 Scott, 359; Marshall v. Oakes, 51 Me. 308; Gray, C. J., in Handy v. Foley, 121 Mass. 259.

⁵ *Supra*, Part III. c. 2.

statement is too general and should be limited to the case of her acting by his coercion.¹ It is said that the privilege of presumptive coercion extends to no other person than a wife, not even to a servant.² The presence of the husband and his direction should usually be concurrent, in order to amount to coercion; and the presumption of a wife's coercion in a tort is, of course, not conclusive, but may be controlled by evidence of the facts.³

As to private wrongs the question occurs, why should the husband be made to stand in the wife's place where the offence is considered against an individual, any more than when it is between herself and the State. This seems to be the true answer, as in case of her debts *dum sola*; namely, that the husband adopts her and her circumstances together; that he takes her fortune, if she has one, and assumes all possible liabilities therefrom.

§ 136. **Torts by the Wife; Limitation of Husband's Liability.**—The last statement suggests that the husband's liability is after all a limited one, where he, in the first instance, was free from wrong: that is to say, that the death of the wife before the recovery of damages puts an end to his liability altogether. This is correct, not only on the principle announced in the case of the wife's debts *dum sola*, but because wrongs, being personal, die with the person, which last is the common explanation of this rule. If the husband dies before damages are recovered in the suit, the wife alone remains liable.⁴ So it would seem that the common law recognizes a liability on her part which continues through the marriage relation; coverture operating, however, so as to suspend the remedy against the married woman, and to bring in as a joint party the custodian of her fortune.

The husband's liability for his wife's torts lasts so long as the relation lasts, even though the married pair be perma-

¹ Gray, C. J., in *Handy v. Foley*, 121 Mass. 259; 2 Kent Com. 149. § 75. Coercion, if relied upon, should be set up in defence. See *Clark v.*

² Reeve Dom. Rel. 72; *Barnes v. Bayer*, 32 Ohio St. 299; *Ferguson v. Harris*, Busbee, 15; *Griffin v. Reynolds*, Brooks, 67 Me. 251. 17 How. (U. S.) 609.

³ *Cassin v. Delany*, 38 N. Y. 178; see *Stroop v. Swarts*, 12 S. & R. 76. ⁴ 2 Bright Hus. & Wife, 22 n.; and *Ferguson v. Brooks*, 67 Me. 251; *Supra*.

nently separated; but possibly not if the wife be living in adultery at the time the wrong was committed.¹ A divorced man is not liable to this joint action for a tort committed, while the relation lasted, by the woman from whom he is divorced.²

§ 137. **Torts by the Wife; Instances; Management of the Defence.**—Hence husband and wife are sued together for the libel or slander of the wife;³ and generally for forfeitures under a penal statute where she participated.⁴ So, too, for assault and battery.⁵ Or for the forcible removal of a gate.⁶ The fact that the husband is made responsible by the fact of coverture, and did not commit the wrong in person, cannot go in mitigation of damages.⁷

The husband has full management of the defence. And we need hardly add that he may compromise without his wife's assent.⁸

§ 138. **Torts by Wife which are based on Contract.**—There are, however, not only *torts simpliciter*, or simple wrongs at law, but wrongs where the substantive basis of the fraud is the wife's contract. The common law has been supposed to apply with the same force in both cases, partly because in the latter instance the person injured would be otherwise without a remedy.⁹

¹ *Head v. Briscoe*, 5 C. & P. 484. Why adultery *per se* should, on legal principle, affect this liability, it is hard to perceive; but if so, one might infer that wherever the husband has ground for divorce he is relieved, though not actually divorced.

² *Capel v. Powell*, 17 C. B. N. S. 743.

³ *McElfresh v. Kirkendall*, 36 Iowa, 224. Exemplary damages may be allowed in such action. *Fowler v. Chester*, 26 Ohio St. 9.

⁴ *Austin v. Wilson*, 4 Cush. 273; *McQueen v. Fulgham*, 27 Tex. 463; *Baker v. Young*, 44 Ill. 42; *Enders v. Beck*, 18 Iowa, 86. As to suits to recover penalties for usury, see *Jackson v. Kirby*, 37 Vt. 448; *Porter v. Mount*, 43 Barb. 422.

⁵ *Griffin v. Reynolds*, 17 How.

(U. S.) 609; *Roadcap v. Sipe*, 6 Gratt. 213. See *Miller v. Sweitzer*, 22 Mich. 391; *Tobey v. Smith*, 15 Gray, 595. For a peculiar state of facts, see *Kowing v. Manley*, 57 Barb. 479. And as to suit for the conversion of stolen millinery by the wife, see *Heckle v. Lurvey*, 101 Mass. 344.

See *Gove v. Farmers', &c. Ins. Co.*, 48 N. H. 41, where a husband, the owner of insured buildings, being guilty of no fraud or gross negligence, was permitted to recover money on the insurance policy, although his insane wife had set the buildings on fire.

⁶ *Handy v. Foley*, 121 Mass. 259.

⁷ *Austin v. Wilson*, 4 Cush. 273.

⁸ *Coolidge v. Parria*, 8 Ohio St. 594.

⁹ *Macq. Hus. & Wife*, 180, 131; *Head v. Briscoe*, 5 Car. & P. 484, per *Tindal, C. J.*; *Reeve Dom. Rel.* 72, 73.

This point came directly before the English Court of Exchequer, in 1854, for decision. The circumstances of the case were as follows: A man applied for a loan of £30 to a loan association, upon the security of a promissory note, to be signed by himself and sureties. One of the sureties was a married woman who falsely represented herself to the association as single. The security was accepted and the loan made. Afterwards the loan association, recurring to the sureties for payment of the note, sought to make her husband liable on the note, alleging her fraud. The court decided that the action was not maintainable; on the ground that though the husband is liable for the wife's general frauds, yet when the fraud is directly connected with her contract, and is the means of effecting it and part and parcel of the same transaction, the wife cannot be responsible, nor can the husband be sued for the fraud together with the wife.¹

In a recent American case, the same doctrine was affirmed where articles had been supplied to a married woman by a tradesman, for which he could not recover payment against the husband under the rule of necessities, and he attempted to get rid of the rule by charging that the wife procured the articles upon false and fraudulent representations that they were needful.² And other decisions are to the same effect.³

But there are cases where the wife will bind her husband by her fraudulent representations on the ground of her agency. Thus in *Taylor v. Green* an advertisement appeared in a newspaper, offering for sale a baker's shop with the goodwill of the business, and misrepresenting the extent of the business. It did not appear that the baker took any part in the transaction, further than to receive the purchase-money and pay the broker his commission. The court held, nevertheless, that he was bound by the fraudulent representations of his wife, inasmuch as she was his agent in managing the shop and finding a purchaser, and that he must respond in

¹ *Liverpool Adelphi Loan Association v. Fairhurst*, 9 Exch. 422. See also *Cooper v. Witham*, 1 Lev. 247.

² *Woodward v. Barnes*, 46 Vt. 332.

³ *Keen v. Hartmann*, 48 Penn. St. 497; *Barnes v. Harris*, Busbee, 15; *Carleton v. Haywood*, 49 N. H. 314. In this last case the wife had received money under an agreement to keep or loan the same according to her judgment.

damages.¹ Nor is the doctrine of the loan-association case as yet broadly applied,² while the modern tendency is, of course, to change the whole coverture doctrine on the point of a wife's torts and frauds.

§ 139. **Torts by Wife; Miscellaneous Points; Husband of Executrix, &c.; Replevin; Equity Proceedings, &c.**—The husband of an executrix or administratrix is liable for her *devastavit*, or other wrongful act committed before or during coverture, if his liability be fixed before the death of the wife.³ And if she survive him, her appointment having been complete in all respects, she becomes liable once more; even for a *devastavit* committed by him when alive.⁴ But the husband cannot be sued as an executor *de son tort* for acts of his wife done without his knowledge; though it is otherwise where he advises or aids her in the commission of the wrongful acts; for every one so participating becomes a principal.⁵

A husband is liable in replevin for his wife's unlawful detention of another's chattels under claim of title in herself.⁶ But where there is no collusion apparent, a husband will not be committed for his wife's breach of injunction.⁷

II. § 140. **Torts committed upon the Wife; General Rule.**—So far as the husband is injured, his right of action is sole; but where the wife is the meritorious cause of action, the spouses join as plaintiffs.

For injuries to the person or character of the wife, therefore, the husband and wife at the common law should sue together.⁸ But where the right of action for damages is founded on the prior possession of personal property, the husband must sue alone, since his possession is the possession of

¹ *Taylor v. Green*, 8 Car. & P. 316; *Macq. Hus. & Wife*, 127. And see, as to the wife's *quasi* criminal act, in violation of the excise laws, *Attorney-General v. Riddle*, 2 Crompt. & Jer. 493.

² See *Wright v. Leonard*, 11 C. B. n. s. (1861) 258.

³ 2 *Bright Hus. & Wife*, 22-36, and cases cited; *Bobe v. Frowner*, 18 Ala. 89.

⁴ *Soady v. Turnbull*, L. R. 1 Ch. 494.

⁵ *Hinds v. Jones*, 48 Me. 348. The wife cannot hold such offices during coverture independently of her husband's control, as we shall see hereafter.

⁶ *Choen v. Porter*, 66 Ind. 194.

⁷ *Hope v. Carnegie*, L. R. 7 Eq. 254. For statutory changes as to torts and frauds of the wife, see *post*, Part V.

⁸ *Bing. Inf. & Cov.* 247, Am. ed., and cases cited; *ante*, § 138.

both.¹ And the joinder of the wife in actions relating to personal property, where the injury was committed after marriage, is good ground of demurrer, or motion to arrest, or even of error after judgment.² Whether the same principle applies to property of the wife parted with before marriage is not so clear. This is the rule, however, when the action is for a wrong, which before the marriage was committed in respect to such property.³ But where the trover is laid before the marriage and the conversion afterwards, there has been some controversy, the result of which seems to be that the action is well brought, either with or without joining the wife, though the better cause doubtless is to join the wife.⁴ The principle sought is whether such a suit amounts to a disaffirmance of the husband's constructive title to the goods on the marriage.⁵

§ 141. **Torts committed upon the Wife; Instances; Practice.**—On these principles it is held that husband and wife must sue together for libel or slanderous words spoken against the latter.⁶ Also for battery of the wife.⁷ Also for injuries sustained by her through the negligence of a common carrier.⁸ Also for the malpractice of a physician.⁹ Also for frauds upon the wife, as in case of an action *qui tam* to recover pen-

¹ Bing. Inf. & Cov. 253, and cases cited; Cro. Eliz. 133; 1 Chit. Pl. 93; 1 Salk. 114.

² Rawlins v. Rounds, 27 Vt. 17.

³ 3 Rob. Pract. 188; Milner v. Milnes, 3 T. R. 627; Fewell v. Collins, 1 Const. 207.

⁴ Powes v. Marshal, 1 Sid. 172; Ayling v. Whicher, 6 Ad. & El. 259; Blackborne v. Haigh, 2 Lev. 107; 3 Rob. Pract. *supra*. There is some uncertainty on this point, however. See Bac. Abr. Baron & Feme (K.); *contra*, Brown v. Fifield, 4 Mich. 322; Wellborn v. Weaver, 17 Ga. 267. Husband and wife cannot sue for malicious replevin of his household furniture with intent to injure her, and resulting in the actual injury of her by the officer, if they begin it pending the action in replevin. O'Brien v. Barry, 100 Mass. 300.

⁵ As to injuries to the wife's real estate, see *infra*, ch. 5.

⁶ Smalley v. Anderson, 2 Monr. 56; Davies v. Solomon, L. R. 7 Q. B. 112; Throgmorton v. Davis, 8 Blackf. 383. These words must be actionable *per se*. See Beach v. Ranney, 2 Hill, 309; Saville v. Sweeney, 4 B. & Ad. 514; Ryan v. Madden, 12 Vt. 51. As to slander of wife charging her with "adultery," see Shafer v. Ahalt, 48 Md. 171. Special damage should be shown in order to sustain the action. *Ib.*; Allsop v. Allsop, 2 L. T. n. s. 290. Words charging her, while unmarried, with fornication, are actionable. Gibson v. Gibson, 43 Wis. 23.

⁷ Pillow v. Bushnell, 5 Barb. 156.

⁸ Heirn v. McCaughan, 32 Miss. 17.

⁹ Even though it afterwards cause her death. Cross v. Guthery, 2 Root, 90; Hyatt v. Adams, 16 Mich. 180.

alties for a fraudulent conveyance.¹ Also for malicious prosecution.² And the rule is the same in all these cases, whether the fraud or injury was committed before or during coverture. But if the wife be a privy to the wrong, or knowingly suffer an injury to be committed upon her, the husband cannot maintain his action; for his right to damages cannot be greater than hers would have been, had she remained single.³ Nor can an action be maintained where the husband instigates the wrong.⁴ In a joint action for personal wrong to the wife, the declaration should conclude "to their damage."⁵ And it is a well recognized principle, both in England and America, that whenever the wife is the meritorious cause of action, her interest must appear on the face of the pleadings, or the omission will be considered fatal.⁶

Where the tort was committed before the woman was married, the action, if she marries afterwards, should be brought by husband and wife; or if she marries pending the action, the husband is entitled to be admitted as a plaintiff.⁷

§ 142. **Torts committed upon the Wife; Damages; Survival of Action.** — The damages allowed as compensation for the frauds and injuries sustained by the wife go to the husband, as well as the rest of her personal property, if recovered during his lifetime. But such suits survive to her where she is the meritorious cause of action; and on the death of the husband, pending legal proceedings, the wife may accordingly proceed to judgment and collect the damages for herself; or if her husband had never brought an action, she may then do so in her own right.⁸ The husband, on the other hand, has no such interest in the suit at common law that he may prosecute it in his own name after his wife's death. His

¹ *Fowler v. Frisbie*, 8 Conn. 320. But see *Crump v. McKay*, 8 Jones, 32, as to negligence "sounding in contract," not admitted to be cause of action.

² *Laughlin v. Eaton*, 54 Me. 156.

³ *Pillow v. Bushnell*, 5 Barb. 156.

⁴ *Tibbs v. Brown*, 2 Grant's Cases, 39. Nor in slander where the words are not actionable, though the wife become ill in consequence of the slander. *Wilson v. Goit*, 17 N. Y. 442.

⁵ *Horton v. Byles*, 1 Sid. 387; *Smalley v. Anderson*, 2 Monr. 56.

⁶ *Staley v. Barhite*, 2 Caines, 221; *Serres v. Dodd*, 5 B. & P. 405; *Thorne v. Dillingham*, 1 Denio, 254; *Pickering v. De Rochemont*, 45 N. H. 67.

⁷ *Gibson v. Gibson*, 48 Wis. 23.

⁸ *Bing. Inf. & Cov.* 247, 248; *Newton v. Hatter*, 2 Ld. Raym. 1208; *Anderson v. Anderson*, 11 Bush, 327.

joinder in the first place was only because of the marriage relation. He may, however, under some statutes, be let in as her administrator, and in such capacity prosecute the suit to its conclusion.¹ If the wife dies after judgment, the husband surviving may take the benefits of the suit; for a judgment debt takes the place of the original cause of action. The death of the wife, pending suit for her personal tort, put an end to the action altogether by the old law.² But where the so-called tort is referable rather to some breach of contract, it might survive.³

§ 143. **Torts committed upon the Wife; Husband's Separate Cause of Action.**— Since the husband is at the common law entitled to the society and services of his wife, two separate causes of action may arise from injuries inflicted upon her person. One, in the name of both for her own injuries, we have just considered; the other is in the name of the husband alone *per quod consortium amisit*.⁴ Thus, if the wife be wantonly bruised and maltreated, her husband may bring his special action *per quod* for the loss of her society and his medical expenses. But there can be no special damage recovered by the husband by way of aggravation in the joint suit for his wife's injuries, which is founded in her meritorious claim. Thus, in the joint action for an assault on the wife, the surgeon's bill cannot be recovered; if for slander of the wife, the loss of wages cannot be claimed; there the sole right of the husband should be sued on in his name.⁵ Nor, on the other hand, can the husband recover for the wife's mental anguish or other damages incidental to the joint suit in his sole suit for damages.⁶ It would appear that the husband may release the damages for his wife's injuries, and then recover for the loss arising to himself alone; he may

¹ Chitty Pl. 74; Norcross v. Stuart, 50 Me. 87; Pattee v. Harrington, 11 Pick. 221; Crozier v. Bryant, 4 Bibb, 174; Saltmarsh v. Candia, 51 N. H. 71.

² Bac. Abr. Baron & Feme (K.); Meese v. Fond du Lac, 48 Wis. 828.

³ Long v. Morrison, 14 Ind. 595.

⁴ 3 Bl. Com. 140; Cro. Jac. 501; *ib.* 538; Mewhirter v. Hatten, 42 Iowa, 288; Brockbank v. Whitehaven Jun-

tion R. R. Co., 7 Hurl. & Nor. 834; Whitcomb v. Barre, 37 Vt. 148; Kavanaugh v. Janesville, 24 Wis. 618; Hooper v. Haskell, 56 Me. 251.

⁵ Dengate v. Gardiner, 4 M. & W. 6; Kavanaugh v. Janesville, 24 Wis. 618; King v. Thompson, 87 Penn. St. 365. See Lewis v. Babcock, 18 Johns. 443.

⁶ Hooper v. Haskell, 56 Me. 251.

certainly release or compromise.¹ Where the husband is alone entitled to the damages, and in case of his death they would go to his representatives, he must sue alone;² and his sole suit will not be defeated by his wife's death before action brought.³

Of the suits which the husband may bring for loss of his wife's society, that for enticing a wife away has already been considered.⁴ Somewhat akin to this is his action for his wife's seduction, founded on the same general marital rights. But the common law still keeps up its legal fiction of the wife's civil incapacity, and treats the seducer as guilty of trespass by force of arms, whether the wife actually consent to the guilt or not.⁵ The damages which the husband may here recover in his own right are not affected by the social rank or condition of the parties;⁶ nor by his own character, save his character as a husband;⁷ but they may be materially influenced by the wife's previous character for chastity;⁸ while if the husband be privy to the crime or consenting thereto, the law treats him as the seducer, and gives him no damages.⁹ But the earlier cases seem to have regarded this last circumstance as tending only to reduce his compensation.¹⁰ A husband who lives apart from his wife, under

¹ Southworth v. Packard, 7 Mass. 96; Anderson v. Anderson, 11 Bush, 327. One who knowingly assists a wife in violating her duty, as by selling her laudanum, may be sued by the husband for the injury he sustains thereby. Hoard v. Peck, 56 Barb. 202.

² Wheeling v. Trowbridge, 5 W. Va. 358.

³ *Ib.*

⁴ *Supra*, § 64.

⁵ 3 Bl. Com. 189, 140. An action on the case is allowable, though not usual. Chamberlain v. Hazlewood, 5 M. & W. 517. See Morris v. Miller, 4 Burr. 2057; Birt v. Barlow, Doug. 171; Freelaconey v. Coleman, 1 B. & Ald. 90; Canefield v. Chamber, 6 East, 244; Tone v. Sumners, 2 Nott & McCord, 267; Forney v. Hallaker, 8 S. & R. 159. See Yundt v. Hartunft, 41 Ill. 9, as to the damages allowable in

such cases. A broad rule is here announced in the husband's favor.

⁶ Norton v. Warner, 9 Conn. 172; per Cheves, J., in Buford v. McLung, 1 Nott & McCord, 268, 277; otherwise, according to Blackstone. See 3 Bl. Com. 140.

⁷ Norton v. Warner, 9 Conn. 172. And see Bromley v. Wallace, 4 Esp. 237.

⁸ 3 Bl. Com. 140; Bull. N. P. 296. Blackstone (*ib.*) adds the consideration of the husband's obligation, by settlement or otherwise, to provide for those children which he cannot but suspect to be spurious.

⁹ 1 Greenl. Evid. § 578; Duberly v. Gunning, 4 T. R. 651, per Lord Kenyon; Rea v. Tucker, 61 Ill. 110; Reeve Dom. Rel. 64; Train v. Bayer, 24 Barb. 614, and cases cited. See Lord Alvanley, in Bromley v. Wallace, 4 Esp. 237.

¹⁰ Selw. N. P., *Adultery*; Bull. N. P. 27.

articles of separation or a decree of divorce from bed and board, cannot maintain a suit for damages *per quod*, since he has suffered no loss of her society.¹

The wife was never permitted to sue for the loss of her husband's society and services,² though on general principle it is hard to see why, save for her coverture, she should not have been.

§ 144. **Torts committed upon the Wife; Instantaneous Death; Torts under Statutes, &c.**—Instantaneous death of the husband or wife, at the common law, gave no right of action to the survivor. Nor could the husband, whose wife was thus killed by another's carelessness, sue *per quod*, because he could not be said to have lost her society during any portion of her life.³ A wife, of course, could not sue for the death of her husband.⁴ Where the wife dies in consequence of one's carelessness, as in case of malpractice, the husband may recover damages for the injury accruing to himself before, but not for the injury in consequence of, the death.⁵ Modern legislation has supplied many new remedies much needed in these classes of cases, particularly with reference to injuries and loss of life occasioned through the carelessness of railroad companies and other common carriers.⁶ And wherever by special statute some right of action for damages is given (as against a town for a defective highway), some of our courts seem disposed to allow the husband's medical

¹ Reeve Dom. Rel. 64; Fry v. Derstler, 2 Yeates, 278. The husband may discharge the cause of action, so as to bar the wife's remedy, even though they are living apart through his fault. Ballard v. Russell, 38 Me. 196. Concerning the effect of a separation pending a suit brought in the joint names of husband and wife, for injuries inflicted upon the latter, see Burger v. Belsley, 45 Ill. 72.

² 2 Kent Com. 182; Tuttle v. Chicago R., 42 Iowa, 518; Carey v. Berkshire R., 1 Cush. 475. An action cannot in general be maintained by the wife, there being no misfeasance towards her independently of a contract with the husband alone. Longmeid v. Holiday, 6 Exch. 761.

³ Yelv. 89, 90; Baker v. Bolton, 1 Camp. 493; Green v. Hudson R. R. Co., 28 Barb. 9; Hallenbeck v. Berkshire R. R. Co., 9 Cush. 109. See Georgia R. R. Co. v. Wynn, 42 Ga. 381, which considers a statute providing only for a wife's suit by reason of her husband's death by railroad accident, and not for a husband's suit by reason of his wife's death.

⁴ 2 Kent Com. 182; Carey v. Berkshire R., 1 Cush. 475.

⁵ Hyatt v. Adams, 16 Mich. 180; Long v. Morrison, 14 Ind. 595.

⁶ Dickens v. N. Y. Central R. R. Co., 28 Barb. 41; Stat. 9 & 10 Vict. c. 98; Mass. Gen. Stats. c. 68, § 97.

expenses by way of aggravation, in the joint suit of husband and wife, even though he may not be empowered to bring a suit in his own name to recover for them as damages *per quod*.¹ In some of these statutory cases, however, the husband may bring his separate suit *per quod* as before, in addition to the suit for the wife's injury.² Where the action is brought in assumpsit, as upon a carrier's contract to carry safely, the considerations are those of contract, not tort.³

III. § 145. **Torts committed upon both Husband and Wife.** — It should be observed that, wherever husband and wife are both injured, they have two distinct and separate causes of action, which must not be confounded. Thus, for libel against husband and wife, the husband must sue alone for the libel against him, and husband and wife jointly for the libel against her; they cannot sue together for the libel against both.⁴ But actions are sometimes consolidated in practice.⁵

§ 146. **As to Doctrine of Wife's Torts, Marriage is Essential.** — We may notice finally one important distinction made between the wife's general contracts and her frauds and injuries. In the one case the man is held liable to third parties for her acts as agent, even though never married to her;⁶ and simple cohabitation is sufficient to charge him. But simple cohabitation will not be enough to make him responsible for her civil injuries. Marriage in fact is essential. And this latter principle applies likewise where he seeks indemnity for her injuries.⁷ The facility with which an agency is created at law may serve to explain the difference between the two cases.

¹ Harwood v. Lowell, 4 Cush. 310; Sanford v. Augusta, 32 Me. 536; Hunt v. Winfield, 38 Wis. 154; Fuller v. Naugatuck R. R. Co., 21 Conn. 557. See Carlisle v. Town of Sheldon, 38 Vt. 440, as to right to recover for damages on a highway, defeated by husband's own carelessness.

² Klein v. Jewett, 26 N. J. Eq. 474; Kavanaugh v. Janesville, 24 Wis. 618; Whitcomb v. Barre, 37 Vt. 148.

Where husband and wife were injured simultaneously and both died, the husband a little before the wife, it was held that the right of action vested

absolutely in the wife. Waldo v. Goodsell, 38 Conn. 462.

³ See Pollard v. New Jersey R., 101 U. S. Supr. 228.

⁴ Gazynski v. Colburn, 11 Cush. 10; Ebersoll v. King, 8 Binn. 555; Newton v. Hatter, 2 Ld. Raym. 1208. For statutory changes as to injuries sustained by the wife, see *post*, Part V.

⁵ Hemstead v. Gas Light Co., 3 Hurl. & C. 745.

⁶ *Supra*, § 121.

⁷ Overholt v. Ellswell, 1 Ashm. 200. See Norwood v. Stevenson, Andr. 227.

CHAPTER IV.

EFFECT OF COVERTURE UPON THE WIFE'S PERSONAL PROPERTY.

§ 147. **Personal Property in General; Marriage a Gift to the Husband of Wife's Personal Property.** — Personal property comprises things in possession, or goods and effects, such as money, furniture, and farm stock, which one holds as the property itself, and things in action, such as bonds and other outstanding debts.¹ The husband's title to his wife's personal property at the common law is either absolute or qualified, according as the particular property belongs to the one class or the other. We shall, therefore, in this chapter, treat of, *first*, the wife's things or personal property in possession; *second*, her things or personals in action.

§ 148. **Extent of this Gift considered; Effect of Divorce, &c.** — But in general it may be premised that the wife's personal property goes to the husband, whether belonging to her at the time of marriage, or acquired afterwards by gift, bequest, or purchase; whether actually or beneficially possessed; whether principal fund or income. So her earnings belong to her husband. Marriage, therefore, operates in this respect as a gift to the husband, and while the gift is only qualified, so far as things in action are concerned, it lies in his power to make the gift absolute during coverture.²

This privilege of the husband lasts as long as the marriage

¹ 2 Bl. Com. 389, 396; 2 Kent Com. 351. See 1 Schouler Pers. Prop. 82-37, where the leading distinctions between "things in possession" and "things in action" are noticed at length, and where reasons are stated why the terms "corporeal" and "incorporeal" personal property should be preferred at this day.

² 1 Bright Hus. & Wife, 84, 85; Co. Litt. 805 a, 351 b; 2 Kent Com. 180, &c.; Campbell v. Galbreath, 12 Bush, 450.

relation continues, even though he be living apart from his wife in adultery, and she acquire the property by her own labor¹ or by bequest.² Neither divorce from bed and board, nor separation, takes away his right.³ But divorce from the bonds of matrimony, or the death of either party, puts an end to the gifts of coverture, leaving open the adjustment of the rights of the respective parties with one another, or between the survivor and the representatives of the deceased, on other principles to be hereafter explained.

And it is a matter of course that the wife's property should be hers in her own right, in order that the husband's title may attach. For property may come to her with restrictions upon the husband's rights, such as the giver has seen fit to impose.⁴ Her *paraphernalia* follow a rule somewhat peculiar.⁵ And, as we shall see in our next part, much of the common law bearing upon this subject is practically superseded by the law of the wife's separate property.

§ 149. *Earnings of Wife vest in Husband.* — Earnings of the wife belong to the husband. The rule of the common law is that he takes all the benefits of her industry.⁶ This rule applies to money earned, and to other produce of the wife's earnings.⁷ He alone can give a discharge for any demand which may arise from her services. He may of course constitute her his agent for receiving the pay to herself; but, without evidence of some such authority, the person who employs her, as a nurse for instance, cannot protect himself by showing her separate receipts.⁸ For these earnings the husband sues alone, and in his own name.⁹ He may consent that they be her own, but that right rests upon his consent, and

¹ *Russell v. Brooks*, 7 Pick. 65; *Turtle v. Muncy*, 2 J. J. Marsh. 82; *Armstrong v. Armstrong*, 32 Miss. 279.

² *Vreeland v. Ryno*, 26 N. J. Eq. 160.

³ *Glover v. Proprietors of Drury Lane*, 2 Chitty, 117; *Washburn v. Hale*, 10 Pick. 429; *Prescott v. Brown*, 23 Me. 805; 1 Roll. Abr. 848. But see *Divorce*, *infra*.

⁴ *Co. Litt.* 351; 11 Mod. 178.

⁵ See *infra*, as to rights upon death of a spouse.

⁶ *Macq. Hus. & Wife*, 44, 45; *Reeve Dom. Rel.* 68; *McDavid v. Adams*, 77 Ill. 155; *Yopst v. Yopst*, 51 Ind. 61.

⁷ *Bucher v. Ream*, 68 Penn. St. 421; *Hawkins v. Providence R.*, 119 Mass. 506.

⁸ *Offley v. Clay*, 2 Man. & Gr. 173; and see *Glover v. Drury Lane*, 2 Chitt. 117; *Russell v. Brooks*, 7 Pick. 65. But see *Starrett v. Wynn*, 17 S. & R. 180.

⁹ *Gould v. Carlton*, 55 Me. 511; *McDavid v. Adams*, 77 Ill. 155.

raises other questions to be considered hereafter;¹ nor can that consent be exercised in disregard of his existing creditors.²

It follows that the proceeds of the joint labor of husband and wife belong at common law to the husband; as where, for instance, they raise cotton together;³ or carry on a hotel or boarding-house or private hospital together.⁴ Money, or cotton, the proceeds, or things personal or land bought with such proceeds, all are the husband's, if he acts consistently with his rights.⁵

§ 150. *Wife's Personal Property in Possession.* — Now to take the broad division of the common law as applied to all the wife's personal property.

First, as to the wife's *choses* or personals in possession, or corporeal personal property. To these the husband's right at common law is immediate and absolute. He may dispose of them as he sees fit during his life, whether with or without his wife's consent; he may bequeath them by will; and after his death such property is regarded as assets of his estate, the title passing to his executors and administrators, to the exclusion of the wife, though she survive him.⁶

If the wife's interest in personal property be that of a tenant in common, the husband becomes a tenant in common in her stead.⁷ So corporeal chattels of a female ward, in the hands of her guardian, being legally hers at the time of marriage, become her husband's, and his marital rights attach at once, notwithstanding the guardian retains possession longer.⁸

¹ See *post*, Part V., as to wife's power to trade, &c.

² *Cramer v. Redford*, 2 C. E. Green, 367; *Post-Nuptial Settlements*, *post*; *Glaze v. Blake*, 56 Ala. 379.

³ *Bowden v. Gray*, 49 Miss. 547.

⁴ *Shaeffer v. Sheppard*, 54 Ala. 244; *Reynolds v. Robinson*, 64 N. Y. 589.

⁵ *Hawkins v. Providence R.* 119 Mass. 596; *Carleton v. Rivers*, 54 Ala. 467.

⁶ Co. Litt. 800, 851 b; 2 Kent Com. 143; *Legg v. Legg*, 8 Mass. 99; *Lamphir v. Creed*, 8 Ves. 599; *Winslow v. Crocker*, 17 Me. 29; *Bing. Inf. & Cov.* 208, cases cited by Am. ed.; *Hoskins v. Miller*, 2 Dev. 860; *Hyde v. Stone*, 9 Cow. 280; *Morgan v. Thames Bank*,

14 Conn. 99; *Hawkins v. Craig*, 6 Monr. 257; *Caffee v. Kelly*, 1 Busb. 48; *Skillman v. Skillman*, 2 Beasley, 403; *Hopkins v. Carey*, 23 Miss. 54; *Cropsey v. McKinney*, 30 Barb. 47; *Carleton v. Lovejoy*, 54 Me. 445.

⁷ *Hopper v. McWhorter*, 18 Ala. 229.

⁸ *Sallee v. Arnold*, 32 Mis. 532; *Chambers v. Perry*, 17 Ala. 726; *McDaniel v. Whitman*, 16 Ala. 348; *Miller v. Blackburn*, 14 Ind. 62. And a guardian, having no right to convert the ward's personalty into real estate, cannot defeat the husband's right by investing thus just before the female ward marries. *Davis's Appeal*, 60 Penn. St. 118; *Schouler Dom. Rel.* 466.

The wife's vested remainder in personal estate goes to the husband on termination of the particular estate; and where both husband and wife die during the continuance of the particular estate, the husband's representatives, and not the wife's, are held to take such remainder.¹ But the husband cannot be considered a purchaser by marriage for a valuable consideration against a legal title admitted to be valid by his wife before marriage.²

Chattels bequeathed to the wife, without restriction, pass to the husband at once like her other things in possession.³ So all her movables, such as jewels, household goods, furniture, and the like, also cash in her hands, go to him absolutely and at once, whether owned by the wife at the time of marriage or nominally vesting in her at some period of her coverture.

§ 151. *Wife's Personal Property in Possession; Subject continued.* — Whether money at her banker's follows this same principle may depend upon a distinction first taken by Sir William Grant in *Carr v. Carr*.⁴ He there says that a balance at a banker's is a debt and not a deposit. But if the money were delivered to the banker in a sealed bag, it would then be truly a *depositum*. It would then have what is called an ear-mark; in other words, it would be a specific chattel, and, as such, would vest by the marriage in the husband as his absolute property.⁵ Therefore, should the husband die without recovering such specific chattels or goods, they would belong to his representatives, and not to the wife by right of survivorship.⁶ The true test of the husband's title is this; whether the personal property in question was or was not technically a thing in possession.

Money actually received from the sale of the wife's land, or as proceeds arising from her inheritance, becomes, as per-

¹ *Tune v. Cooper*, 4 Sneed, 296.

² *Willis v. Snelling*, 6 Rich. 280.

³ *Shirley v. Shirley*, 9 Paige, 363; *Newlands v. Paynter*, 4 M. & C. 408; *Crane v. Brice*, 7 M. & W. 183; *Rex v. French*, R. & R. C. C. 491.

⁴ 1 Mer. 543, *n*.

⁵ Per Sir William Grant in *Carr v.*

Carr, 1 Mer. 543; *Hill v. Foley*, 1 Phil. 404. Money deposited with a banker in the usual way is money lent to the banker, with the obligation superadded that it be repaid when called for. *Pott v. Cleg*, 11 Jur. 289.

⁶ *Hawkins v. Providence R.*, 119 Mass. 596.

sonal property, apart from equity rules, the absolute property of the husband.¹ And if he invests the same in his own name, no resulting trust will arise in the wife's favor.²

As to the wife's personal apparel, the doctrine of *paraphernalia* will be found to reserve to her a needful right in the most delicate instance where controversy can arise. Otherwise it would appear that her apparel belongs to her husband at common law. Such apparel purchased from their joint earnings is certainly his in such sense that he only can sue others for its loss. She cannot sell or give her clothing away, probably, except by virtue of an agency; which agency, however, might be readily inferred from circumstances. But the wife's reasonable clothing belongs to the husband for the wife's use, like her victuals and other necessities, and he must not wantonly deprive her of it so as to leave her destitute. Even if he allows her to leave him on an agreement of separation, it may be presumed that he gives her the right to the clothing she takes with her.³ Happily such petty controversies seldom occur between husband and wife.

§ 152. *Wife's Incorporeal Personal Property or Choses in Action; Reduction by Husband is requisite. — Secondly.* The husband's right to his wife's incorporeal personal property — or at least to her *choses in action*, as they are commonly called — is qualified.⁴ Marriage operates, not as an absolute gift of such property, but rather as a conditional gift, the condition being that the husband shall do some act, while coverture lasts, to appropriate the *choses* to himself. If he happen to die before he has done so, such *choses*, not having been reduced to possession, remain the property of the wife, and his personal representatives have no title in them.⁵ But this applies

¹ *Plummer v. Jarman*, 44 Md. 632; *Macq. Hus. & Wife*, 19, 20; 1 Bac. Abr. Lichtenberger v. Graham, 50 Ind. 288. 700, tit. Baron & Feme, V.; 1 Roper

² *Thomas v. Chicago*, 55 Ill. 108.

See §§ 152, 153, *post*. It is here assumed that equity does not impress the proceeds with the character of the original property from reasons such as will sometimes occur.

³ See *Delano v. Blanchard*, 52 Vt. 578.

⁴ *Powes v. Marshall*, 1 Sid. 172;

Hus. & Wife, 169; 1 Vent. 261.

⁵ Co. Litt. 351; 1 Bright *Hus. & Wife*, 36; 2 Kent Com. 135 *et seq.*, and cases cited; *Scawen v. Blunt*, 7 Ves. 294; *Fleet v. Perrins*, L. R. 3 Q. B. 536; *Langham v. Nenny*, 3 Ves. 467; *Tritt v. Colwell*, 81 Penn. St. 228; *Needles v. Needles*, 7 Ohio St. 432; *Burleigh v. Coffin*, 2 Fost. 118.

only to outstanding things in action; for some may have been reduced to possession by the husband during his lifetime, and some may not. If the wife die before the husband has reduced the *chose* to possession, he has no title in it as husband, but it goes, strictly speaking, to her administrator or personal representative,¹ though under our statutes the husband has commonly the right both to administer and inherit a good part of his wife's personal property, and she cannot will otherwise.²

With respect to such *choses in action* as may accrue to the wife solely, or to the husband and wife jointly, during coverture, the same doctrine applies. The husband may disagree to his wife's interest and make his own absolute at any time during coverture by recovering in suit in his own name or otherwise reducing them to possession. But until such disagreement, such *choses in action* belong to the wife, and, if not reduced into possession by the husband, will likewise survive to her.³

Reduction during the minority of an infant husband is good, though he dies before majority.⁴

§ 153. **What are the Wife's Choses in Action.**—It becomes important, therefore, to distinguish the wife's things in action from her things in possession. To the class of things in action belong such property as rests upon obligation, contract, or other security, for payment; and not only rights presently vested and capable of immediate reduction to possession, but those which are contingent upon some event or reversionary upon some prior interest.⁵ Debts owing the wife, arrears of rents, of profits, and of income, also outstanding loans, are plainly *choses in action*.⁶ Money due on mortgage is, before foreclosure, a *chose in action*, and even though lent before

¹ Walker v. Walker, 41 Ala. 253; cases cited; Wilkinson v. Charlesworth, Fleet v. Perrins, L. R. 3 Q. B. 536; 11 Jur. 644; Standeford v. Devol, 21 Scrutton v. Pattillo, L. R. 19 Eq. Ind. 404.
869.

² See, as to dissolution by death, *post*.

³ Coppin v. —, 2 P. Wms. 497;
Day v. Padrone, 2 M. & S. 396, n.;
Howell v. Maine, 3 Lev. 403; Wildman
v. Wildman, 9 Ves. 174; 1 Bright Hus.
& Wife, 37; 2 Kent Com. 135, and

⁴ Ware v. Ware, 18 Gratt. 670. As
to reduction by the husband of an in-
fant wife, see Shanks v. Edmondson,
28 Gratt. 804.

⁵ See Bell Hus. & Wife, 52.

⁶ 1 Bright Hus. & Wife, 36; Clapp
v. Stoughton, 10 Pick. 463.

coverture with covenants running to the wife's heirs or executors, it must follow the usual rule.¹ So are bonds and certificates of stock.² Income of a *chose in action* is as much a *chose* as the principal itself; and according to the ordinary rule the wife becomes entitled to it by survivorship.³ A devise of land to be sold and proceeds to be divided among certain persons, gives to each a *chose in action*.⁴

Bills of exchange and promissory notes, unlike many *choses in action* in being legally transferable by simple indorsement, are now considered *choses in action* of a peculiar nature, though it was formerly thought that they vested absolutely in the husband by marriage;⁵ and bank checks, certificates of deposit,⁶ and public securities of a negotiable character⁷ may be placed in the same class.

Legacies and distributive shares are sometimes treated as though they vested absolutely in the husband without reduction into possession; but unquestionably the better opinion is that they are *choses in action* (especially if no decree of distribution has been rendered, or the estate is unsettled), in which case the creditor of the husband ought not to be allowed to attach them before the latter has done some act disaffirming his wife's title.⁸ The wife's *choses in action* must not be

¹ Bell Hus. & Wife, 52; *contra*, Turner v. Crane, 1 Vern. 170; Rees v. Keith, 11 Sim. 388.

² Slaymaker v. Bank, 10 Penn. St. 373; Wells v. Tyler, 5 Fost. 340.

³ Wilkinson v. Charlesworth, 11 Jur. 644.

⁴ Smilie's Estate, 22 Penn. St. 130.

⁵ Gaters v. Maddeley, 6 M. & W. 423; Nash v. Nash, 2 Madd. 133; 1 Roper Hus. & Wife, 211; 1 Bright Hus. & Wife, 37 a, 38; Richards v. Richards, 2 B. & Ad. 447; Scarpellini v. Acheson, 7 Q. B. 864; 9 Jur. 827; Phelps v. Phelps, 20 Pick. 556; Hayward v. Hayward, ib. 525; Lenderman v. Talley, 1 Houst. 523.

⁶ Rodgers v. Pike County Bank, 69 Mo. 560.

⁷ Such, for instance, as United States bonds. Brown v. Bokee, 53 Md. 155.

⁸ 2 Kent Com. 135; cases cited in Am. editor's notes to Bing. Inf. & Cov.

209; Carr v. Taylor, 10 Ves. Jr. 574, 578; Lamphir v. Creed, 8 ib. 509; Palmer v. Trevor, 1 Vern. 261. See Schuyler v. Hoyle, 5 Johns. Ch. 196; Curry v. Fulkerson, 14 Ohio, 100; Wheeler v. Moore, 18 N. H. 478; Harper v. Archer, 8 Sm. & M. 229; Probate Court v. Niles, 32 Vt. 775; Hooper v. Howell, 50 Ga. 165; Jacks v. Adair, 81 Ark. 616; Chappell v. Causey, 11 Ga. 25; Gillet v. Camp, 19 Mo. 404; Johnson v. Spaight, 14 Ala. 27; Gallego v. Gallego, 2 Brock. 285; Revel v. Revel, 2 Dev. & Batt. 272; Wallace v. Talliaferro, 2 Call, 447; Clifton v. Haig, 4 Des. 330. See *contra*, Albee v. Carpenter, 12 Cush. 382; Wheeler v. Bowen, 20 Pick. 563; Griswold v. Pennington, 2 Conn. 564; Holbrook v. Walters, 19 Pick. 354. But even in Massachusetts, where the doctrine prevails which is disapproved in the text, it is held that if the husband die before

confounded with her goods or specific chattels in the hands of third parties, which, unlike her *choses in action*, vest in the husband absolutely by the marriage.¹

Money rights or claims generally, as for instance a claim for damages growing out of a tort committed upon the person or character of the wife, fall under our present head.²

§ 154. **What constitutes Reduction of the Wife's Choses in Action.** — What acts on the husband's part amount to an appropriation of his wife's *choses in action*, or in other words constitute reduction into possession so as to bar her rights by survivorship, may here be fitly considered. Mere intention on his part is not sufficient. The purpose must be followed by some positive act asserting an ownership.³

Nor is actual possession of the *chose in action* a sufficient reduction *per se*, for the husband's intention may be to hold it in the right of another. Thus he may take the property in trust for his wife; and if so he is accountable like any other trustee.⁴ So he may receive it as a loan from his wife, in which case he shall refund it like any other borrower. That reduction into possession which makes the *chose* absolutely as well as potentially the husband's, is a reduction into possession, not of the thing itself, but of the title to it.⁵ Constructive possessions are not favored in law when they tend to defeat the wife's survivorship. Yet reduction into possession of the wife's *chose in action*, unexplained by other circumstances, is *prima facie* evidence of conversion to the husband's use, and is therefore effectual.⁶ And reduction of a fund may be sufficient upon the happening of a condition annexed to it.⁷

The receipt of the husband and wife jointly for the wife's *chose in action* does not constitute sufficient reduction by the

judgment in the suit by creditors, his wife's survivorship is not barred. *Strong v. Smith*, 1 Met. 476. See *Parks v. Cushman*, 9 Vt. 820, which allows the wife's share to be attached in trustee process by the husband's creditors after a decree of distribution.

¹ See *supra*, § 148; 1 Schouler Pers. Prop. 32-37.

² *Anderson v. Anderson*, 11 Bush. 827.

³ *Blount v. Bestland*, 5 Ves. Jr. 515.

⁴ *Baker v. Hall*, 12 Ves. Jr. 497; *Estate of Hinds*, 5 Whart. 138; *Mayfield v. Clifton*, 8 Stew. 375; *Resor v. Resor*, 9 Ind. 347; *Bell Hus. & Wife*, 57.

⁵ *Strong, J.*, in *Tritt's Admr. v. Caldwell's Admr.*, 31 Penn. St. 233.

⁶ *Johnston v. Johnston*, 1 Grant Cas. 468. Lapse of time may raise a presumption of reduction in the husband's favor. *Harper v. Archer*, 28 Miss. 212.

⁷ *Dunn v. Sargent*, 101 Mass. 836.

husband, for this is the proper form of receipt given to third parties when the fund is placed in the wife's hands.¹ But the sole receipt of the husband with intent to appropriate constitutes a complete reduction, the property having been delivered to him instead of the wife.²

It is clear that the receipt of interest due on a bond or note is not a sufficient reduction of the latter, nor of future instalments, although it constitutes a reduction of the particular interest instalment itself.³ The same principle applies to the conversion of stock dividends or coupons on securities.⁴ Nothing short of the transfer of stock standing in the wife's name to the husband's name seems to be a sufficient reduction of such stock into possession;⁵ the transfer to their joint names is insufficient.⁶

Since stock which stands in the wife's name does not belong to her husband until reduced to possession by him, it follows that he cannot be made personally liable in respect to the fund where he has failed to so reduce it.⁷

As to bills and notes, there is a conflict between the earlier and later cases, from the fact that negotiable instruments were not formerly regarded as *choses in action* at all.⁸ Assuming them to be such, however, the indorsement and transfer of the husband is a sufficient reduction into possession. Hence, if a note be made payable to the order of a *feme sole*, and she afterwards marries, her husband may transfer the note to himself or others by his own indorsement.⁹

¹ *Timbers v. Katz*, 6 W. & S. 290.

² *Roll. Abr.* 342, 350; 1 *Bright Hus. & Wife*, 53; *Lowe v. Cody*, 29 Ga. 117.

³ *Howman v. Corrie*, 2 Vern. 190; *Hart v. Stephens*, 6 Q. B. 937; *Stanwood v. Stanwood*, 17 Mass. 57; *Burr v. Sherwood*, 3 Bradf. Sur. 85.

⁴ *Dunn v. Sargent*, 101 Mass. 336.

⁵ *Arnold v. Ruggles*, 1 R. I. 165; 2 *Bright Hus. & Wife*, 54; *Slaymaker v. Bank*, 10 Penn. St. 373; *Brown v. Bokee*, 53 Md. 155.

⁶ *Nicholson v. Drury Buildings Estate Co.*, L. R. 7 Ch. D. 48.

⁷ *Dodgson v. Bell*, 3 E. L. & Eq.

542. And see *Matter of Reciprocity Bank*, 22 N. Y. 9.

⁸ See *Scarpellini v. Acheson*, 7 Q. B. 864; 9 Jur. 827; *Gaters v. Maddeley*, 6 M. & W. 428; *McNeillage v. Holloway*, 1 B. & Ald. 218; *Sherrington v. Yates*, 12 M. & W. 855; 1 *Par. Bills & Notes*, 87. If a note be payable to husband and wife, it would clearly survive to the latter. *Richardson v. Daggett*, 4 Vt. 336; *Draper v. Jackson*, 16 Mass. 480. See also *post*, as to gifts to husband and wife.

⁹ *Mason v. Morgan*, 2 Ad. & El. 30; *Evans v. Secrest*, 3 Ind. 545. And the wife's signature is mere surplusage where both indorse the note. *Id.*

The receipt of partial payment, it would seem, is only a reduction *pro tanto*.¹ The wife cannot indorse over a note payable to her order, even with authority from her husband, where it does not appear that the indorsement was made for value received by the husband from the indorsee, or as a gift from the husband to the indorsee; if she does so, it does not bar her rights by survivorship.² Her indorsement without his assent is *prima facie* bad.³ If a note be not negotiable, the husband alone can transfer it.⁴ A note made payable to order of "A. B. (a married woman), or to A. B. and her husband" in the alternative, constitutes the husband the payee.⁵ What evidence irrespective of indorsement and transfer by the husband suffices to show reduction into possession—as for instance where the note is payable to bearer—is not quite clear from the authorities. But reduction of the wife's notes into possession is not effected by the husband, merely because he keeps them, for safety and at her request, with his own papers; it certainly is not while he consistently treats them as hers, asserting no claim to them;⁶ nor does the fact that her whole property consisted of such notes, and that at her request and because they were not due, he provided the wedding dress and furnished the house, give the husband a lien upon them, or amount to a reduction.⁷ A collection of the wife's notes would be a reduction into possession; and so probably would be transfer and delivery, with intent to pass the property.

§ 155. What constitutes Reduction of the Wife's Choses in Action; Subject continued. — Reduction into possession is not necessarily effected by delivery into the husband's hands of a *chose in action*; for the intent of the parties at the time of delivery is open to explanation. Thus where the makers

¹ Nash v. Nash, 2 Madd. 183.

² Scarpellini v. Acheson, 7 Q. B. 864.

³ Wall v. Tomlinson, 16 Ves. Jr. 413; Hemmingway v. Matthews, 10 Tex. 207; Tryon v. Sutton, 13 Cal. 490.

⁴ Evans v. Secrest, 8 Ind. 545.

⁵ Wildman v. Wildman, 9 Ves. Jr. 174; Twisden v. Wise, 1 Vern. 161; Ryland v. Smith, 1 M. & C. 53.

⁶ Miller v. Aram, 87 Wis. 142.

⁷ Holmes v. Holmes, 28 Vt. 765.

And see Lenderman v. Talley, 1 Houst. 523. A negotiable note given to a third party by a husband before marriage is not extinguished by the mere fact of its purchase from such party by the wife, by money belonging to her before marriage, not reduced to possession by the husband. Russ v. George, 45 N. H. 487.

of a promissory note, payable to the wife or bearer, and given as the proceeds of sale of her real estate, hand the note to the husband, who immediately delivers it to the wife, in whose separate possession it thereafter continues, no reduction takes place.¹ But it would be otherwise, we apprehend, if the husband had placed the note among his own effects, never given it to his wife, nor admitted a trust on his part, and in all other respects acted as the owner of the property.

If the husband places the wife's *chose* in an envelope, with a memorandum that it be disposed of as directed by his will, keeps it in his possession, and then leaves a will disposing of it, the reduction is complete.² But the mere assertion of title thereto by a disposition under the husband's will does not amount to a reduction during his lifetime or while coverture lasts.³

An agreement to sell the fund is not a reduction into possession.⁴ Nor is a fund reduced by being set off against the husband's debt, no money having passed nor releases having been interchanged. At least this is the doctrine of some cases. Thus in *Harrison v. Andrews*, a testator gave a legacy to the wife; the husband being indebted to the testator in an equal amount, the husband and wife agreed to set off the debt against the legacy, and signed a legacy receipt for the amount; but it was held that these acts constituted no reduction.⁵

If the husband pledges his wife's *chose in action* not already reduced to possession, or assigns it as collateral security, it would appear that on the redemption of such pledge or security the *chose* is placed *in statu quo*, and remains the property of the wife until further reduction: Whether the same can be said of a chattel mortgage is not certain.⁶ The

¹ *Barber v. Slade*, 30 Vt. 191; *Hall v. Young*, 37 N. H. 134; *Barron v. Barron*, 24 Vt. 375.

² *Dunn v. Sargent*, 101 Mass. 336.

³ *Grebill's Appeal*, 87 Penn. St. 105; *Scrutton v. Pattillo*, L. R. 19 Eq. 369.

⁴ *Harwood v. Fisher*, 1 Younge & Coll. 110; 1 *Bright Hus. & Wife*, 52.

⁵ 13 Sim. 595. So *Sir Wm. Grant*,

in *Carr v. Taylor*, 10 Ves. Jr. 574. See other cases cited in n. to 1 *Bright Hus. and Wife*, 52.

⁶ *Latourette v. Williams*, 1 Barb. 9; *Hartman v. Dowdel*, 1 Rawle, 279. There is a *dictum* of Chancellor Kent (2 Kent Com. 137; also in *Schuyler v. Hoyle*, 5 Johns. Ch. 196) to the effect that the mortgage of a *chose in action* is of itself a sufficient reduction into pos-

language of the instrument in describing the parties might aid in determining the question of intention whenever it arises. Certainly, whatever may be the technical difference between a pledge and a chattel mortgage, the latter operates a defeasible title only in the mortgagee. As to money secured by a mortgage to the wife, it is held that, if the debt has been once paid to the husband, reduction is completed, even though he die before executing a reconveyance of the property. Under such circumstances equity will actually compel the wife to reconvey and perfect the title without allowing her any benefits from the property.¹

Where real estate of the wife is sold, and notes are given payable to her, the property changes its character, and becomes personal property in the shape of a *chose in action*.² The husband may then reduce into possession as in other cases. And if the executor or other party making the sale pays the cash proceeds into the husband's hands, the money belongs to him absolutely, and his receipt extinguishes all claims of his wife.³ So if the notes taken for the purchase-money are in the husband's own name, the reduction is held complete.⁴ Money paid by a married woman upon a bond to convey land to her is *prima facie* her husband's, and may be recovered by him.⁵ And proceeds of the sale of a widow's dower vest in her second husband.⁶ But circumstances in all such cases favor a resulting trust in the wife's favor.

session. We find no authorities to support this statement. But see *Tritt v. Colwell*, 31 Penn. St. 228, a recent case which recognizes a distinction in this respect between a pledge and a mortgage.

¹ *Rees v. Keith*, 11 Sim. 388; *Bosoll v. Brander*, 1 P. Wms. 458; *Bates v. Dandy*, 2 Atk. 208.

² *Taggart v. Boldin*, 10 Md. 104; *McCrary v. Foster*, 1 Iowa, 271. See *Peacock v. Pembroke*, 4 Md. 280; *Ramsdale v. Craighill*, 9 Ohio, 199.

³ *Johnson v. Bennett*, 89 Barb. 287; *Thomas v. Chicago*, 55 Ill. 108; *Plummer v. Jarman*, 44 Md. 682.

⁴ *Dixon v. Dixon*, 18 Ohio, 113; *Talbot v. Dennis*, 1 Carter, 471; *Mc-*

Crory v. Foster, 1 Iowa, 271. When secured by mortgage, the mortgage also ought to be in the husband's name. But cf. language of court in *McCullough v. Ford*, 96 Ill. 439.

⁵ *Casey v. Wiggins*, 8 Gray, 231.

⁶ *Ellsworth v. Hinds*, 5 Wis. 618; *Bartlett v. Janeway*, 4 Sandf. Ch. 396 (N. Y. Stat.). In *Barber v. Slade*, 30 Vt. 191, it is held that where husband and wife agree with the makers of a promissory note given to the wife for her lands deeded to them, that they should furnish her family with goods, and apply them upon the note; goods so delivered constitute a part-payment; but *aliter* as to goods delivered by the husband's order to persons not members

Legacies and distributive shares in like manner vest absolutely in the husband by reduction into possession, but not before. And where a wife is entitled to a portion of the assets of her first husband's estate, and then remarries, her second husband must reduce this portion into possession during coverture, or it will survive to her.¹ The institution of a suit to recover a legacy accruing to the wife is not *sua vi* a reduction when brought in the name of both parties.² But payment to the husband or his attorney, after judgment, operates a reduction.³ The husband may assign a legacy or distributive share like any other *chose*.⁴ Reduction of a legacy has been considered complete where the husband takes a quitclaim deed from the testator's residuary devisee upon condition that he shall pay this and the other legacies.⁵ But some distinct act of ownership on the husband's part is necessary; and it is doubtful whether his right is complete even after a decree of distribution, the decree itself effecting no reduction. The share or legacy should be actually severed from the bulk of the estate whence it was derived.⁶

It is held that where an estate in personalty vests in the wife under a will, and becomes a legal interest by the executor's assent, and goes into possession of the person in whom was vested the precedent particular estate, and no adverse possession is shown, such estate passes to the husband by virtue of his marital rights.⁷ Where chattels are delivered to T. on behalf of himself and the other next of kin, of whom Mrs. W. is one, and Mr. W. sells to T. his wife's share, and

of the family. Reduction of such note by husband requires a positive act.

¹ *Harper v. Archer*, 28 Miss. 212. See also *Ex parte Norton*, 35 E. L. & Eq. 609; *Montefiore v. Belireno*, L. R. 1 Eq. 171; *Wiggins v. Blount*, 83 Ga. 409.

² *Knight v. Branner*, 14 Md. 1; *Harris v. Taylor*, 3 Sneed, 536; *Hall v. McLain*, 11 Humph. 425.

³ *Alexander v. Crittenden*, 4 Allen, 342. See *post*, § 157.

⁴ *Bryan v. Spruill*, 4 Jones Eq. 27; *Weems v. Weems*, 19 Md. 834.

⁵ *Howard v. Bryant*, 9 Gray, 239.

⁶ *Short v. Moore*, 10 Vt. 446; *Probate Court v. Niles*, 82 Vt. 775; *Lewis v. Price*, 3 Rich. Eq. 172; *Walker v. Walker*, 25 Mis. 867; *Vanderveer v. Alston*, 16 Ala. 494. As to whether the husband's note given for purchase at the administrator's sale can be set off against the wife's claim for distributive share, see *Roberts v. Adams*, 2 S. C. n. s. 337, which holds that it cannot.

⁷ *Walker v. Walker*, 41 Ala. 353.

receives and appropriates the purchase-money, this is a clear reduction of possession.¹

Any act on the husband's part which amounts to a complete act of exclusive ownership over his wife's *chose in action*, such act of ownership extending to the whole fund in question — is an effectual reduction into his own possession. The rule is, that if he recovers her debt by a suit in his own name, or if he releases the debt, or novates the debt by taking a new security in his own and not in his wife's name, — in all these cases, upon his death and the dissolution of the marriage relation, the right of survivorship in the wife to the property is found to have ceased.²

§ 156. **Reduction into Possession; Subject continued; Resulting Trust; Payment to Agent, &c.** — But the property must come under the actual control of the husband, *quasi* husband, and not as trustee or attorney for the wife; though a husband's appointment as trustee will not deprive him of the same right to reduce the trust fund to his own possession, which he would have were a third person the trustee.³ The cases show, in short, that there should always exist both the intent to appropriate to his own use and the act of appropriation. Thus there may be a resulting trust implied from various circumstances connected with the case. Thus, where the husband receives the proceeds of a sale of the wife's lands or of her landed inheritance, under an agreement to treat the same as a loan to himself or to reinvest it for her benefit, or to hold it as her trustee or attorney, the disposition of the courts is very strong to rule against a full reduction into possession. And such disposition must be the stronger where a full reduction would convert real into personal property, and thereby disturb the usual property rights.⁴ All this, however, does not prevent a full reduction from taking place upon suitable evi-

¹ *Widgery v. Tepper*, L. R. 7 Ch. D. 423. *land v. Smith*, 1 My. & Cr. 53; *Burnham v. Bennett*, 2 Coll. 254; *Barron v. Barron*, 24 Vt. 375; *Savage v. Benham*, 17 Ala. 119. But see *Rees v. Keith*, 11 Sim. 388.

² 2 Kent Com. 137, 138. See *Hanson v. Miller*, 14 Sim. 22; 8 Jur. 209, 352; *Burnham v. Bennett*, 2 Coll. C. C. 254; *Scott v. Hix*, 2 Sneed, 192.

³ *Wall v. Tomlinson*, 16 Ves. 413; *Dunn v. Sargent*, 101 Mass. 336; *Ry-*

⁴ See *Drury v. Briscoe*, 42 Md. 154.

dence ;¹ but the appropriation of the spouse as husband may be negatived by proof of his declarations and acts and conduct when the supposed appropriation took place.²

Reduction into possession may be effected through the medium of a third person duly empowered to act for that purpose.³ And the receipt of the wife's distributive share by an agent appointed under a power of attorney executed by the wife to her husband is a sufficient reduction by the husband, and enables the latter to sue the attorney for the proceeds.⁴ Even where husband and wife together appoint an agent to receive the wife's legacy, and he receives it and does not pay it over, his receipt is a conversion of the fund, and the husband may treat the property as his, and sue accordingly.⁵ But where A. receives money for the use of a married woman, and writes to her that he holds the money at her disposal, this constitutes an attornment to the wife, and not to the husband ; and the latter must do something more in order to make the fund his own.⁶ And where husband and wife empower an attorney to collect and receive on the wife's account, or the agent in question receives the fund, not by way of reducing on the husband's behalf, the husband's right remains unexercised.⁷

This third person may be a banker ; and if a banker or other party does not reduce, but holds the fund on deposit, it is material to know how that deposit stands. A married woman's fund held subject during coverture, not to the husband's sole drafts, checks, or orders, but to the order of both husband and wife,⁸ or to the order of either,⁹ must, as to the residue not drawn when coverture ceases, be considered as never reduced to the husband's possession. A receipt of the fund subject to the order of either spouse, or their joint order,

¹ *Thomas v. Chicago*, 55 Ill. 108.

² *Moyer's Appeal*, 77 Penn. St. 482 ;
Perry v. Wheelock, 49 Vt. 63.

³ *Roll. Abr.* 842, 850 ; 1 *Bright Hus. & Wife*, 63.

⁴ *Turton v. Turton*, 6 Md. 875 ; *Alexander v. Crittenden*, 4 Allen, 342.

⁵ *Seem* such reduction by agent is of itself a reduction by the husband. *Dardier v. Chapman*, L. R. 11 Ch. D.

442. No instructions were given to the agent to collect in the wife's right.

⁶ *Fleet v. Perrins*, L. R. 3 Q. B. 588.

⁷ *Hill v. Hunt*, 9 Gray, 66 ; *Chappelle v. Olney*, 1 Sawyer, 401.

⁸ *Scrutton v. Pattillo*, L. R. 19 Eq. 369.

⁹ *Scrutton v. Pattillo*, L. R. 19 Eq. 369 ; *Brown v. Bokes*, 53 Md. 155 ; *Parker v. Lechmere*, 41 L. T. 152.

cannot be set up against the wife or her representative; nor is a transfer of stock to the joint names of husband and wife;¹ nor the receipt and indorsement of a check payable to the order of husband and wife, which the husband does not deposit or use for his sole account.²

It is held in England that, where the husband was a lunatic, payment into court of the wife's *chose in action* to the credit of the lunacy amounted to a reduction into possession.³ But in New Hampshire a singular doctrine is laid down; namely, that the husband's right of reduction is so far personal to him that it cannot be exercised by his guardian if he be insane.⁴

The husband's right to reduce his wife's *choses in action* into possession is one of election merely. He may therefore neglect or refuse to do so, and thus keep the property vested in his wife.⁵ This becomes a very important principle in determining the rights of his creditors. For, supposing him to be embarrassed in his affairs, can they attach the unreduced *choses in action* of his wife as his property? It is settled that they cannot. But if he once makes the property his own, they can reach it; and he cannot transfer it again to his wife in prejudice of their pre-existing rights, even though it vested in him but for a brief time. Of course his own expressions of regret cannot avail against the husband's actual and complete appropriation of his wife's *choses in action*.⁶ And even his subsequent promise to refund that which he has once made absolutely his own is a promise without legal consideration, and the wife or her representative cannot enforce it.⁷

§ 157. *Reduction into Possession by Assignment.* — This brings us to a very perplexing branch of the present subject; namely, that of the husband's reduction into possession

¹ *Nicholson v. Drury Buildings Estate Co.*, L. R. 7 Ch. D. 48.

² *Parker v. Lechmere*, 41 L. T. 152.

³ *In re Jenkins*, 5 Russ. 183.

⁴ *Andover v. Merrimack County*, 37 N. H. 487.

⁵ *Coffin v. Morrill*, 2 Fost. 352; *Har-*

ris v. Taylor, 3 Sneed, 536; *Gallego v. Gallego*, 2 Brock. 287; *Mellingen v. Bansmann*, 45 Penn. St. 522; *Stoner v. Commonwealth*, 16 Penn. St. 387; *Snowden v. Lindsley*, 6 Cold. 122. See *Peacock v. Pembroke*, 4 Md. 280.

⁶ *Nolen's Appeal*, 23 Penn. St. 37.

⁷ *Fletcher v. Updike*, 3 Hun, 350.

by assignment. *Choses in possession* are capable of assignment. *Choses in action*, however, with the exception of negotiable instruments, such as bills of exchange, checks, and promissory notes (to which we may doubtless add coupon bonds¹), cannot be assigned at law; but in equity they may.² The assignment, however, to be effectual, should be without reservation. And the husband's agreement to assign is likewise sustainable in equity, on the principle that what one agrees to do shall be considered as done.³ A joint assignment by husband and wife appears to have been sustained as something stronger than the husband's sole assignment, where the wife herself has not sought to avoid it afterwards.⁴ But whether the husband's assignment of itself will bar the rights of the wife by survivorship, and constitute reduction into possession, is quite another thing.

If the assignment of the wife's *choses in action* be purely voluntary and without consideration, it does not bind the wife.⁵ As, for instance, where a husband, pending divorce proceedings against him, makes a pretended transfer for the purpose of barring her rights to the property. Nor does a voluntary assignment for the benefit of creditors carry them.⁶ A general assignment in bankruptcy or insolvency passes at law the wife's property; and by way of partial recompense, as it would appear, the husband's discharge has been allowed to operate upon the wife's debts *dum sola* as well as his own. But in equity the assignees are permitted to take the same interest in the wife's *choses in action* as the husband possessed, and no more; and unless they reduce them into possession during her husband's lifetime she will be entitled to them by survivorship.⁷ Indeed, in Pennsylvania a voluntary assign-

¹ See *Thomson v. Lee County*, 8 Wall. 327. Thomas Plumer, in *Johnson v. Johnson*, 1 Jac. & Walk. 472; *Jewson v.*

² *Crouch v. Martin*, 2 Vern. 595; Moulson, 2 Atk. 417; 2 Kent Com. 187; *Hartman v. Dowdel*, 1 Rawle, 279.

³ *Druce v. Dennison*, 6 Ves. 894; ⁶ Cases *supra*; *Wright v. Rutter*, 2 Ves. Jr. 678; 1 Bright Hus. & Wife, 81.

⁴ *McCaleb v. Crichfield*, 5 Heisk. 288.

⁵ *Wright v. Rutter*, per Lord Alvanley, 2 Ves. Jr. 673; *Burnett v. Kinnaston*, 2 Vern. 401; Sir Wm. Grant, in *Mitford v. Mitford*, 9 Ves. 87; Sir ⁷ *Sherrington v. Yates*, 12 M. & W. 855; *Miles v. Williams*, 1 P. Wms. 249; *Mitford v. Mitford*, 9 Ves. 87; 2 Kent Com. 138; *Van Epps v. Van Deusen*,

ment of the husband to trustees for wife and child, so as to defeat his creditors, has been upheld by a court of equity against such creditors on the ground that it was for the benefit of his wife and child.¹

But the equity rule as to assignments of the wife's *chores in action* to individuals for valuable consideration is very capricious. It was formerly maintained that the husband's assignment of his wife's *chose in action* for a valuable consideration would bar not only a present interest of the wife, but also a contingent interest, or the possibility of a term or a specific possibility.² Sir William Grant threw doubt upon this doctrine by the objection that this would give the assignee a greater right than the husband himself.³ It remained for Sir Thomas Plumer to break it down completely, and to place all assignments upon the same footing. This he attempted in the celebrated case of *Purdew v. Jackson*,⁴ where the question arose as to the effect of an assignment by husband and wife of her vested interest in remainder. In an elaborate opinion he maintained that whatever the nature of the assignment, whether in bankruptcy, to trustees for payment of debts, or to a specific purchaser for value, it could pass the husband's interest and no more; that the assignee must afterwards reduce the property to possession during the husband's lifetime; and that no assignment was possible of the wife's reversionary interest, so as to bar her as survivor, provided the interest continued reversionary. Afterwards Lord Lyndhurst, while approving this doctrine to the extent of the actual decision, suggested a distinction between the cases where the husband can completely appropriate, at the time of the assignment, and those where he cannot; and thought that the assignment might stand in the former instance as an agreement to appropriate

¹ Paige, 64; *Outcalt v. Van Winkle*, 1 Green Ch. 516; *Moore v. Moore*, 14 B. Monr. 259; 1 Bright Hus. & Wife, 79, 88, and cases cited; *Hay v. Bowen*, 5 Beav. 610; *Poor v. Hazleton*, 15 N. H. 564; *Mann v. Higgins*, 7 Gill, 265.

² *Siter v. Jordan*, 4 Rawle, 468. See also *Andrews v. Jones*, 10 Ala. 400; *contra*, *Dold v. Geiger*, 2 Gratt. 98; *O'Connor v. Harris*, 81 N. C. 279.

³ See *Chandos v. Talbot*, 2 P. Wms. 601; *Bates v. Dandy*, 2 Atk. 207; *Hawkins v. Obin*, ib. 549; *n. to 2 Kent Com.* 138.

⁴ *Mitford v. Mitford*, 9 Ves. 87. And see *Hornaby v. Lee*, 2 Madd. Ch. 16.

⁵ 1 Russ. 1-71 (1823). In *Ashby v. Ashby*, 1 Coll. 558, this rule was fully approved. See, too, *Edison v. Elwin*, 13 Sim. 809.

or a sort of equitable reduction into possession.¹ The later English cases seem to follow this suggestion.² So that the present doctrine in England is understood to be that the husband's assignment for value to a specific purchaser will bar the wife's survivorship, provided the husband has during coverture the right of reducing into his own possession; but that he cannot assign, so as to bar the wife's survivorship, unless such reduction becomes possible before his death.³

In this country the rule is far from uniform. The Pennsylvania courts, repudiating this modern chancery doctrine altogether, maintain that the assignment to a specific purchaser for value bars the wife's right of survivorship.⁴ For, it is said, the husband by marriage gains a full power of disposal over his wife's property, and any distinction between vested and contingent interests in respect to the marital dominion and power of transfer is unsound.⁵ This doctrine has received approval in some other States.⁶ But the doctrine of *Purdew v. Jackson* has been more frequently approved by our courts; probably, if the question should now arise again, with the qualifications which Lord Lyndhurst introduced.⁷

There seems to be no reason for a distinction between releases and assignments from the husband, so far as the effect upon the wife's survivorship is concerned. But in one case it was observed that the husband's release might amount to

¹ *Honner v. Morton*, 3 Russ. 65.

² Per Lord Brougham, *Stanton v. Hall*, 2 Russ. & My. 175; *Elliott v. Cordell*, 5 Madd. Ch. 149.

³ *Tidd v. Lister*, 17 E. L. & Eq. 587; s. c. on appeal, 3 De G., M. & G. 857.

⁴ *Shuman v. Reigart*, 7 W. & S. 169; *Siter's Case*, 4 Rawle, 468; *Webb's Appeal*, 21 Penn. St. 248; *Smilie's Estate*, 22 Penn. St. 130.

⁵ See *Siter's Case*, *supra*, per Gibson, C. J.

⁶ *Manion v. Titworth*, 18 B. Monr. 582; *Turtle v. Fowler*, 22 Conn. 58; *Hill v. Townsend*, 24 Tex. 575.

⁷ *Bugg v. Franklin*, 4 Sneed, 129; *George v. Goldsby*, 23 Ala. 326; *Arington v. Yarborough*, 1 Jones Eq. 72;

Lynn v. Bradley, 1 Met. (Ky.) 232;

O'Connor v. Harris, 81 N. C. 279;

Smith v. Atwood, 14 Ga. 402; *State*

v. Robertson, 5 Harring. 201; *Needles*

v. Needles, 7 Ohio St. 492; *Bryan v.*

Spruill, 4 Jones Eq. 27. The hus-

band's assignee may avail himself of

fraud upon the husband's marital rights.

Joyner v. Denny, Busbee Eq. 176. In

Stiffe v. Everitt, 1 M. & C. 87, Lord

Cottenham suggests what may be at

the foundation of the present distinc-

tion in the English equity rule as to

assignees for value, namely, that nei-

ther the husband alone, nor the hus-

band and wife together, can dispose of

the wife's life-interest in a fund, beyond

the duration of the coverture. See

Macq. Hua. & Wife, 58, 59.

reduction as against the wife.¹ A later decision, however, puts releases and assignments on the same footing.² And in this country no distinction is made between the two modes of transfer.³

§ 158. *Reduction into Possession by Suit; by Arbitration, etc.* — The wife's outstanding *choses* may be recovered by a suit so as to prevent them from going back to her in case she be the survivor. The general rule is that for property accruing to the wife *before* marriage, the wife must be joined in the suit, although the husband during coverture may alter the debtor's liability, as by changing the security, or giving time on a promise to himself, and may then sue alone;⁴ in which case, perhaps, the reduction into possession is effected by the alteration of the debt and not by the suit. Where, however, property accrues to the wife *after* marriage, the husband may elect either to sue alone or to join his wife as the meritorious cause.⁵ Such being the state of the law, there is a distinction between suits brought in the husband's name alone, and suits in the name of both husband and wife. In the former case he elects to disaffirm his wife's title, and bringing the suit operates as a reduction.⁶ In the latter he admits her possible title by survivorship, and the reduction is ineffectual until the debt is collected on execution or otherwise;⁷ for even a recovery of judgment is insufficient.⁸ Wherever practice recognizes a separate right in the wife, a judgment which may be considered as obtained at her wishes, or for her benefit, is inconclusive evidence of reduction.⁹

¹ *Hore v. Becher*, 12 Sim. 465, 6 Jur. 94, Shadwell, V. C.

² *Rogers v. Acaster*, 11 E. L. & Eq. 300; 14 Beav. 445.

³ *Needles v. Needles*, 7 Ohio St. 432; *Kenny v. Udall*, 5 Johns. Ch. 464.

⁴ *Yard v. Ellard*, 1 Salk. 117, pl. 8; *Carth.* 468; *Sid.* 299.

⁵ See *Bright Hus. & Wife*, 61-66; *Chitty Pl.* 32-38, 7th ed.

⁶ *Oglander v. Baston*, 1 Vern. 396; 2 Ves. Sen. 677; 12 Mod. 346. See *Pierson v. Smith*, 9 Ohio St. 554, as to insufficiency of judgment in husband's favor where he sued for destroying wife's separate property.

⁷ *Bond v. Simmons*, 3 Atk. 21. The exception formerly made in favor of bills of exchange and promissory notes does not now exist. See cases *supra*, § 153. The husband must therefore follow the above rules of suit. *Sherrington v. Yates*, 12 M. & W. 855; 1 Dowl. & L. 1032.

⁸ *Crittenden v. Alexander*, 15 Gray, 432. An order for the proceeds of the judgment collected in a suit may be so treated by the husband that the wife's right survives, even though the husband's administrator collects it. *Perry v. Wheelock*, 49 Vt. 68.

⁹ *Pike v. Collins*, 38 Me. 38; *Pettigill v. Butterfield*, 45 N. H. 195.

In chancery proceedings both husband and wife are made parties; and, as we shall presently see, equity compels a settlement upon the wife before entering a decree in the husband's favor. It is said that decrees in chancery so far resemble judgments at law that until the money be ordered to be paid, or declared to belong to the husband, the wife's rights will remain undisturbed. A decree in the joint names of husband and wife is insufficient reduction.¹ But an order for payment of money to the husband vests it in him free from the wife's right by survivorship.²

As to the submission to arbitration it is said that the original claim is extinguished by the award and a new duty thereby created.³ If the money awarded be *to the husband*, and he die before payment, it will go to his personal representatives, and not his wife.⁴ So much has been decided. Some are of the impression that in other respects the wife's interest will depend upon the stage of proceedings reached at the time of the husband's death, and that neither the submission to arbitration, nor the award itself, unless in the husband's favor, operates as a reduction into possession.⁵

§ 159. *Reduction into Possession; Conclusion.* — The result of the foregoing observations is that reduction into possession offers many very nice distinctions, involving conflicting rights of considerable magnitude. Courts of equity, which have taken this subject under their especial control, seem to lay down variable rules; and it must be confessed that the law of reduction is so built upon exceptions, that one may more readily determine what acts of the husband do *not*, than what acts *do*, bar the wife's survivorship. Another difficulty in dealing with this subject appears from the circumstance that personal property is rapidly growing, and species of the incor-

¹ *Mason v. McNeill*, 23 Ala. 201; *Lowery v. Craig*, 30 Miss. 19.

² See *Nanney v. Martin*, Eq. Cas. Abr. 68; 8 Atk. 726; *Macaulay v. Phillips*, 4 Ves. 19; *Heygate v. Annesley*, 3 Bro. C. C. 362; 1 *Bright Hus. & Wife*, 67-69; *Lowery v. Craig*, 30 Miss. 19.

³ *Reeve Dom. Rel.* 21. But see *Hunter v. Rice*, 15 East, 100; *Thorpe v. Eyre*, 1 Ad. & El. 928; 8 Nev. & M. 214.

⁴ *Oglander v. Baston*, 1 Vern. 396.

⁵ See 1 *Bright Hus. & Wife*, 70; *Macq. Hus. & Wife*, 52. The wife will not be bound by her agreement pending suit. *Macaulay v. Phillips*, 4 Ves. 15. But why should not the husband be allowed to disaffirm his wife's title by submitting the *chose* to arbitration as his own as well as in suing alone?

poreal sort are developed quite unknown to the old common law; while, on the other hand, the doctrine of the wife's separate estate has expanded so fast as to furnish already new elements of consideration for most of the latest reduction cases, threatening to extinguish at no distant day all the old learning on the subject, even before its leading principles could be clearly shaped out in the courts.

§ 160. *Wife's Equity to Settlement where Chancery is sought.*—The wife's equity to a settlement, which constitutes an important branch of the English chancery jurisprudence, is closely connected with the husband's right of reduction into possession. Whenever the husband or his representative has to seek the aid of a court of chancery in order to recover his wife's property, he must submit to its order of a suitable settlement from the fund. This settlement, which is made upon the wife for the separate benefit of herself and the children as a provision for their maintenance and comfort, is known as the wife's equity.¹ Thus chancery, by a stretch of power somewhat arbitrary, interferes to do an act of justice. The doctrine seems to rest upon two grounds: first, that whoever comes into equity must do equity; second, that chancery is the special champion of women and children.²

The rule is the same whether the thing to be reduced into possession be a debt, legacy, or distributive share belonging to the wife, or any other *chose in action*.³ Chancery will also restrain the husband, by injunction, from proceeding to recover a fund in the ecclesiastical or probate courts until a like provision is made; for the reason that it has a concurrent or appellate jurisdiction in the settlement of estates.⁴ In this country a court of equity has sometimes gone so far as to lay hold of

¹ 2 Kent Com. 139-143, and cases cited; 1 Bright Hus. & Wife, 230-265; 2 Story Eq. Juris. § 635.

² *Meals v. Meals*, 1 Dick. 373; *Peachey Mar. Settl.* 158, 159. This jurisdiction appears to have been exercised from the earliest period. *Sturgis v. Champneys*, 5 M. & C. 103, per Lord Chancellor Cottenham.

³ *Kenney v. Udall*, 5 Johns. Ch. 464; 3 Cow. 590; *Durr v. Bowyer*, 2 McCord,

Ch. 368; *Duvall v. Farmers' Bank of Maryland*, 4 Gill & Johns. 282; *Barron v. Barron*, 29 Vt. 875, 891; *Abernethy v. Abernethy*, 8 Fla. 243; *Haviland v. Bloom*, 6 Jones Ch. 178; *Smith v. Kane*, 2 Paige, 303.

⁴ *Jewson v. Moulson*, 2 Atk. 419; *Robinson v. Robinson*, L. R. 12 Ch. D. 188; *Dumond v. Magee*, 4 Johns. Ch. 318.

property for which recovery is sought in the courts of common law.¹ But the English cases do not warrant such an exercise of power.² The blending of equity and common-law functions in American tribunals might here justify a departure from the parent system, while there are doubtless States which follow the English rule in this respect.³

But the wife's equity does not attach to her property while in the hands of third persons. They may, if they choose, defeat it by placing the fund directly in the husband's hands without the intervention of a suit. Thus, where an executor pays over a legacy accruing to the wife, taking a proper receipt from the husband, a court of equity will not call it back from the husband to enable a settlement to be enforced;⁴ but it is otherwise if the executor pays the legacy over after proceedings are commenced. For as soon as the bill is filed, the court becomes the trustee of the fund.⁵

As to assignees and legal representatives of the husband, the rule is the same. Their application to the court is treated as the husband's would have been; especially if the assignment in question has not effected a complete reduction so as to bar the wife's survivorship: a topic which has already been sufficiently discussed.⁶ The court disregards the party who asks equity, and fastens the obligation upon the property itself.⁷

¹ *Van Epps v. Van Deusen*, 4 Paige, 64; note to 2 Kent Com. 140; 2 Kent Com. 141, 142; *Corley v. Corley*, 22 Ga. 178; *Dearin v. Fitzpatrick*, Meigs, 551. But see *Matter of Miller*, 1 Ashm. 323; *Parsons v. Parsons*, 9 N. H. 309-336; *Allen v. Allen*, 6 Ired. Eq. 298.

² 1 *Roper Hus. & Wife*, 283; *Jacob's* notes to 1 *Roper Hus. & Wife*, 257, 258; *Oswell v. Probert*, 2 Ves. Jr. 682; *Sturgis v. Champneys*, 5 M. & C. 105; *Jewson v. Moulson*, 2 Atk. 419. And see *Jackson v. Hill*, 25 Ark. 223. According to the latest English decisions, the wife's equity does not extend to a reversionary interest. No settlement can be asked until the fund falls into possession; i. e., until the husband has a right to receive it. *Osborn v. Morgan*, 8 E. L. & Eq. 192.

³ *Wiles v. Wiles*, 3 Md. 1.

⁴ *Glaister v. Hewer*, 8 Ves. 205; *Murray v. Elibank*, 10 Ves. 90; *Bell Hus. & Wife*, 115; *Pool v. Morris*, 29 Ga. 374.

⁵ *Murray v. Elibank*, 10 Ves. 90; *Delagarde v. Lempriere*, 6 Beav. 347; *Wiles v. Wiles*, 3 Md. 1; *Crook v. Turpin*, 10 B. Mon. 243. But see *Dearin v. Fitzpatrick*, Meigs, 551.

⁶ *Oswell v. Probert*, 2 Ves. Jr. 679; *Jacobson v. Williams*, 1 P. Wms. 382; *Jewson v. Moulson*, 2 Atk. 417; *Earl of Salisbury v. Newton*, 1 Eden, 370; *Bosvil v. Brander*, 1 P. Wms. 458; *Kenney v. Udall*, 5 Johns. Ch. 484; *McCaleb v. Crichfield*, 5 Heisk. 288; 2 *Bright Hus. & Wife*, 236. See discussion of *Purdew v. Jackson*, and other cases *supra*; *Carter v. Carter*, 4 S. & M. 59.

⁷ *Aguilar v. Aguilar*, 5 Mad. 414; *Taunton v. Morris*, L. R. 11 Ch. 779;

But the wife's right of equity to a settlement is something distinct from her right of survivorship; that is, her right upon her husband's death to property not reduced by him.¹ And even if the husband has assigned the fund, the court will protect such equity upon due application.² The husband's assignee for valuable consideration takes subject to the wife's equity, although her survivorship may have been barred by the assignment.³ But the wife's antenuptial debts must first be provided for.⁴

§ 161. *Wife's Equity to a Settlement; Subject continued.* — A distinction seems to have been made, however, in the English chancery courts, between cases in which the wife takes an absolute interest, and those in which she takes a life interest only. In cases where the wife takes an absolute interest the provision is for her and her children. But where her interest is only for life the provision is for her separate benefit alone; and it is impossible in such cases to make any provision for children; the question consequently is one between the husband and wife simply. So, too, where the wife's interest is absolute, her right to a provision for herself and children is independent of the conduct of her husband; but where she takes a mere life interest, her right arises from the non-fulfilment of his obligations. Finally, where the wife has an absolute interest, the purchaser takes subject to a settled equity; but where the wife takes for life only, such equity may not exist.⁵ This reasoning, however, which is somewhat artificial, does not commend itself to the latest authorities; for it is recently held in the English Chancery that the wife is entitled to her equity to a settlement out of property in

Osborne v. Edwards, 8 Stockt. 73. See 2 Story Eq. Juris. § 1414; Wiles v. Wiles, 3 Md. 1; Guild v. Guild, 16 Ala. 121.

¹ Norris v. Lantz, 18 Md. 260; Hall v. Hall, 4 Md. Ch. 283.

² Osborne v. Edwards, 8 Stockt. 73.

³ Moore v. Moore, 14 B. Monr. 259; 2 Story Eq. Juris. § 1412, and cases cited. In McCaleb v. Crichfield, 5 Heisk. 288, the assignee was held entitled to the residuary interest under a will assigned by husband and wife

jointly, no proceedings having been set on foot by the latter during her life to avoid the assignment or enforce her equity.

⁴ Barnard v. Ford, L. R. 4 Ch. 247.

⁵ Tidd v. Lister, on Appeal, 3 De G., M. & G. 857; a. c. 10 Hare, 153; Peachey Mar. Settl. 162-164; cases of Stanton v. Hall, 2 Russ. & M. 175, and other cases, commented upon in Tidd v. Lister, *ib.* See as to life estate, next chapter.

which she has only a life interest, as out of property to which she has an absolute interest, and that no distinction between the two cases is tenable.¹

Where the fund is payable in terms for the benefit of husband and wife during their joint lives, it is inconsistent with such a trust to allow the wife an equity therein.²

The wife's equity to a settlement does not extend to a reversionary interest. The settlement of such a fund cannot be asked for until it falls into possession; that is, until the husband has a right, subject to the wife's equity, to receive it.³ But as to all vested interests, whether acquired by gift, devise, or inheritance, before or during coverture, the rule of equity is that the property is subject to the settlement of a suitable provision for her support, unless expressly waived by her, or forfeited through her misconduct; and this settlement will be protected equally against the husband, his creditors or his assignees, with or without value, so far as chancery can properly exercise jurisdiction in the premises.⁴ Where part of a reversionary fund falls into possession, the wife's equity may be settled upon her from such part, with liberty to apply upon the remaining portion of the fund falling into possession.⁵ An equity may be allowed the wife out of land in controversy purchased by an insolvent husband with her personalty not reduced to possession by him, where a creditor seeks to compel a conveyance to himself of the land.⁶

Where the interest claimed by the husband in right of his wife is merely equitable, or where, though in its nature legal, it becomes from collateral circumstances the subject of a suit in equity, the wife has a right to a provision out of the fund. As where, for example, it is vested in trustees who have the legal estate, the wife, or rather the husband in her right, having only the equitable or beneficial interest.⁷ But the wife's

¹ *Taunton v. Morris*, L. R. 8 Ch. D. 458, and cases cited; L. R. 11 Ch. D. 779.

² *Ward v. Ward*, L. R. 14 Ch. D. 506.

³ *Osborn v. Morgan*, 8 E. L. & Eq. 192; 9 Hare, 432.

⁴ *Barron v. Barron*, 24 Vt. 375.

⁵ *Marshall v. Fowler*, 15 E. L. & Eq. 480.

⁶ *Sims v. Spalding*, 2 Duv. 121.

⁷ *Macq. Hus. & Wife*, 69; *Ex parte Blagden*, 2 Rose, 251; *Oswell v. Probert*, 2 Ves. Jr. 680; *Sturgis v. Champneys*, 5 M. & C. 103.

equity attaches only to such property as her husband was entitled to receive in his marital right.¹

The smallness of a fund is no bar to a settlement.² Nor matters it that a fund is not actually distributable; for a wife may proceed for her equity pending administration; and the more so if reasons press, such as her delicate health and her husband's insolvency.³

Equity courts will generally preserve the wife's portion from the capital of the fund which is made the subject of equity proceedings, and the husband will be allowed to appropriate the income of the fund without hindrance.⁴ But a liberal discretion is exercised by the court, according to the circumstances; even, it may be, to the disadvantage of the husband's creditors;⁵ and where the husband received a large fortune through his wife, and has squandered nearly the whole of it, the remaining fund may be placed where it will accumulate for her benefit or the income may be paid for her support. So if he maltreats her or otherwise conducts himself shamefully. And if he becomes insolvent the wife may have a reasonable provision secured to her out of her life estate.⁶

There is no definite rule fixed as to the proportion which the wife should receive for her equity. Such awards regard both wife and children. The amount is regulated at discretion and will depend upon a variety of circumstances, such as the extent of the fund, the husband's income from other sources, the funds he may have already received through his wife, the extent of former settlements, the size of his dependent family, and the marital conduct of both parties.⁷ Where the

¹ *Knight v. Knight*, L. R. 18 Eq. 487. Here an executor, who was husband of a legatee, was indebted to the testator, and was unable to discharge his indebtedness; and it was held that the wife had no equity.

² *In re Kincaid's Trusts*, 17 E. L. & Eq. 396. A strong instance of the liberality of the court of equity is afforded in *Scott v. Spashett*, 16 Jur. 157; 9 E. L. & Eq. 265.

³ *Robinson v. Robinson*, L. R. 12 Ch. D. 188.

⁴ *Bond v. Simmons*, 3 Atk. 20; *Ellis*

ott v. Cordell, 5 Madd. 156; *Vaughan v. Buck*, 18 Sim. 404.

⁵ *Montefiore v. Behrens*, L. R. 1 Eq. 171.

⁶ *Bond v. Simmons*, 3 Atk. 20. As to insolvency where husband has not taken benefit of bankrupt acts, see *Ex parte Cosegayne*, 1 Atk. 192; *Pryor v. Hill*, 4 Bro. C. C. 142; *Oswell v. Probert*, 2 Ves. 682; *Bell Hus. & Wife*, 121.

⁷ 2 *Bright Hus. & Wife*, 240, 241, and cases cited; *Freeman v. Fairlee*, 11 Jur. 447; *Gardner v. Marshall*, 14 Sim.

husband is shown to be cruel, dissolute, or improvident, or where he has abandoned his family and neglected to provide for their support, a court of chancery will not hesitate to set apart at least the greater part of the fund for the benefit of the wife and children.¹ So, if he be insolvent, the wife is favored, to the exclusion, if necessary, of his creditors. In one case it was observed by Alderson, B., that the wife and children ought to have the whole fund as against the husband's assignee in insolvency, and he said that if he was bound by the practice of the court to take out any part of it, he would take out one shilling.² In later instances the whole of a small fund has been set apart for wife and children where the husband was insolvent or guilty of gross misconduct.³

§ 162. *Wife's Equity to a Settlement; Subject continued.* — But though the wife's equity to a settlement is recognized as due herself and her children, the right is so far personal to herself that it cannot be exercised by any one else, and it expires if she die pending proceedings, though there may be children surviving her.⁴ The husband in such case takes the

575; *Green v. Otto*, per Sir J. Leach, 1 S. & S. 254; *Farrar v. Bessey*, 24 Vt. 89; *Bagshaw v. Winter*, 11 E. L. & Eq. 272; *Cutler's Trust*, 6 E. L. & Eq. 97; *McVey v. Boggs*, 3 Md. Ch. 94; *Beeman v. Cowser*, 22 Ark. 429.

¹ *Coster v. Coster*, 9 Sim. 597.

² *Brett v. Greenwell*, 3 Y. & C. Eq. Ex. 230. But see *Pugh, Ex parte*, 12 E. L. & Eq. 350.

³ Most frequently one half has been allowed the wife as her equity under ordinary circumstances. 2 *Bright Hus. & Wife*, 241, and cases cited; *Peachey Mar. Settl.* 176, 177. Where the wife had been allowed a divorce for adultery, the whole fund was settled upon her, the court justly observing that if adultery of the wife barred her from receiving, adultery of the husband ought to bar him equally. *Burrows v. Burrows*, 12 E. L. & Eq. 268. See rule as stated in *Re Suggitt's Trusts*, L. R. 3 Ch. 215; *White v. Gouldin*, 27 Gratt. 491. In *Spirett v. Willows*, L. R. 1 Ch.

520, L. R. 4 Ch. 407, three fourths of the fund were settled on wife and children, the husband being a bankrupt. See form of settlement there prescribed. The whole fund was settled on the wife and children in *White v. Cordwell*, L. R. 20 Eq. 644, the husband being insolvent and destitute. And see *Taunton v. Morris*, L. R. 8 Ch. D. 453; L. R. 11 Ch. D. 779, where it is held that as between life estate and absolute interest there ought to be no distinction concerning the amount of property to be settled.

⁴ *Delagarde v. Lempriere*, 6 Beav. 344, per Lord Langdale; *Baldwin v. Baldwin*, 5 De G. & S. 319; *contra*, *Steinmetz v. Halthin*, 1 G. & J. 67. See *Peachey Mar. Settl.* 166, 167. But not, according to the English equity practice, if she die, after a certain advanced stage of the proceedings. See *Rowe v. Jackson*, 2 Dick. 604; *Murray v. Elibank*, 10 Ves. 92; *Lloyd v. Mason*, 5 Hare, 149; *Bell Hus. & Wife*, 128,

proceeds as in other cases. In fact, the latest cases show a clear disposition on the part of the court to leave a dutiful husband's interest in any such fund unimpaired, except so far as may be necessary to provide for the wife and for all children she may possibly have; for which reason a fund will be limited, after the death of the husband and in default of children of the wife, to the husband, whether he survives her or not.¹ The wife's adultery is a complete bar to the equity; and other misconduct would certainly reduce the amount if not extinguish the equity altogether.² But it does not follow that in case of the wife's adultery the fund would be decreed absolutely and at once to the husband; the court might wait until the anomalous relationship of the parties had been legally determined by divorce.³ Notwithstanding a separation between husband and wife under a deed, if they come together again, and the provisions of the separation deed do not dispose meantime of the fund, the wife may claim her equity.⁴

The husband may become the purchaser of his wife's fortune where he has made a competent settlement upon her before marriage. Regarding him in this light, chancery will in such a case not only refuse to allow the wife a settlement from the fund in litigation, but will let in his representatives after his death to make the reduction complete.⁵ Lord Eldon said, however, that in order to bar the wife's equity the articles of marriage settlement should expressly state that it was in consideration of the wife's fortune, or else the contents must import it as clearly as if expressed.⁶ A jointure is not an adequate settlement, for this is merely a bar of her pos-

129; *Peachey Mar. Settl.* 168, and cases cited; *Baldwin v. Baldwin*, 15 E. L. & Eq. 168. In *Hobgood v. Martin*, 81 Ga. 62, the children were allowed to file a supplemental bill after the wife's death.

¹ *Walsh v. Wason*, L. R. 8 Ch. 482; *In re Suggitt's Trusts*, L. R. 8 Ch. 215; *Croxton v. May*, L. R. 9 Eq. 404.

² *Ball v. Montgomery*, 2 Ves. 191; *Carr v. Eastbrooke*, 4 Ves. 146; *Peachey Mar. Settl.* 174-176; *Carter v. Carter*, 14 S. & M. 59; *Fry v. Fry*, 7 Paige, 462.

³ *Barrow v. Barrow*, 18 Beav. 529.

This rule has been modified in extreme cases, however, so as to grant equity even after adultery. *In re Lewin's Trusts*, 20 Beav. 378; *Greedy v. Lavender*, 18 Beav. 64; *Ball v. Coultas*, 1 Ves. & B. 302.

⁴ *Ruffles v. Alston*, L. R. 19 Eq. 539.

⁵ 2 Kent Com. 143; *Cleland v. Cleland*, Prec. in Ch. 63; *Poindexter v. Jeffries*, 15 Gratt. 363.

⁶ *Druce v. Dennison*, 6 Ves. 395. See *Salway v. Salway*, Amb. 692; *Carr v. Taylor*, 10 Ves. 574; *Doe v. Ford*, 2 El. & B. 970.

sible dower. But any adequate settlement, *eo nomine*, seems to be an effectual bar to the wife's equity. A covenant to settle must be performed by the husband before he can be regarded as a purchaser.¹ And the cases admit that a marriage settlement is not presumed to cover property accruing during coverture, but is to be confined to such as belongs to the wife at the time of settlement, unless apt words are used to indicate a different intent of the parties thereto.²

The wife may waive her equity to a settlement; for, unlike her right of survivorship, it is the mere creature of equity. But her consent must be formally taken under the direction of the court, and apart from her husband.³ The court will not receive the wife's consent until her share is ascertained,⁴ and an order made with the wife's consent may afterwards be set aside if prejudicial to her interests.⁵ If a wife who has funds in chancery be not of full age, she is incapable of giving consent to its disposition; and hence her waiver during minority will not be permitted, but the court will protect her interests as justice may require.⁶

A married woman may also be precluded by her own fraud from claiming her equity against purchasers. Thus, where a married woman wrote out an assignment of her reversionary interest in a trust fund, dating it before marriage and signing it in her maiden name, in order to enable her husband to borrow money upon it, and afterwards gave to the purchasers a letter to one of the trustees of the fund, stating that she had before her marriage assigned her interest in the same to her husband,—it was held, notwithstanding some evidence of coercion in the first instance, that she was debarred from

¹ Bell *Hus. & Wife*, 418, and cases cited; *Holt v. Holt*, 2 P. Wms. 647; *Pyke v. Pyke*, 1 Ves. Sen. 376. *Ex parte Geddes*, 4 Rich. Eq. 301; *Clark v. Smith*, 18 S. C. 585.

² Note to 2 Kent Com. 148. See *Jernegan v. Baxter*, 6 Madd. 32; *Peachey Mar. Settl.* 181.

³ 1 Dan. Ch. Pract. 95; *Set. on Decrees*, 255, 256; *Macq. Hus. & Wife*, 75; *Coppedge v. Threadgill*, 8 Sneed, 577; *Ward v. Amory*, 1 Curt. C. C. 419. See *Watson v. Marshall*, 19 E. L. & Eq. 569; 17 Jur. 651. See *Tobin v. Dixon*, 2 Met. (Ky.) 422.

⁴ *Abraham v. Newcome*, 12 Sim. 566; *Phillips v. Hassell*, 10 Humph. 197; *Cheatham v. Huff*, 2 Tenn. Ch. 616; *Shipway v. Ball*, L. R. 16 Ch. D. 876. *Waiver by wife may be established by acts and*

claiming a settlement.¹ And the wife's stinginess in dealing with her separate estate, the absence of misconduct on the husband's part, and the fact that she has ample means of her own, irrespective of any allowance which might be made from the new fund, are also circumstances which may debar her from receiving an equity therein, where she and her husband are living separate.²

§ 163. **Personal Property held by Wife in Trust Capacity; Wife as Executrix.** — Property held by the wife in a representative capacity at the time of marriage cannot vest in the husband; for here she has no beneficial interest which the law can transfer to her husband.³ Any other rule would operate a fraud upon creditors and *cestuis que trust*. But if the wife be executrix or administratrix at the time of her marriage, the husband is entitled to administer in her right, by way of partial offset to his liability for her frauds and injuries in such capacity. As incidental to this authority, he may release and compound debts, and dispose of the effects, and reduce outstanding trust property into possession, as his wife might have done before coverture.⁴ He is accountable for all property which came to her possession, whether actually received by him or not.⁵ A married woman cannot become executrix or administratrix without her husband's concurrence; so long, at least, as he remains liable for her acts;⁶ nor will payments made to her in such capacity without his assent be valid.⁷ It

¹ *In re Lush's Trusts*, L. R. 4 Ch. 591. And see *Sharpe v. Foy*, L. R. 4 Ch. 35.

² *Giacometti v. Prodgers*, L. R. 14 Eq. 253; L. R. 8 Ch. 338. As to equity of settlement on foreclosing a mortgage see *Hill v. Edmonds*, 15 E. L. & Eq. 280; *post*, § 165.

³ Co. Litt. 351; 11 Mod. 178; 1 Bright Hus. & Wife, 89, 40.

⁴ *Ib.*; Jenk. Rep. 79; Woodruffe v. Cox, 2 Bradf. Sur. 158; Keister v. Howe, 8 Ind. 268; Claussen v. La Franz, 1 Iowa, 226; Dardier v. Chapman, L. R. 11 Ch. D. 442. And may foreclose a mortgage with a co-executrix. *Buck v. Fischer*, 2 Col. T. 709.

⁵ *Scott v. Gamble*, 1 Stockt. 218.

For a case in which the husband put money of his own into a bank where the wife had an account as executrix, see *Lloyd v. Pughe*, L. R. 8 Ch. 88.

⁶ Administration has been granted to a wife living apart from her husband under a deed of separation with apt provisions. *Goods of Hardinge*, 2 Curt. 640.

⁷ 1 Salk. 282; *Lover v. Lover*, 6 Jur. 156; *Bubbers v. Hardy*, 8 Curt. 50; cases cited in 2 Redf. Wills, 78. As to the indorsement of a note payable to the wife as administratrix, see *Roberts v. Place*, 18 N. H. 183. And see *Murphree v. Singleton*, 37 Ala. 412. Statutes sometimes require the husband to join in the wife's bond as executrix.

is to be generally observed in cases of this kind that the right of disposition which the husband exercises is strictly the right of performing the trust vested in his wife, it being assumed that she cannot perform it consistently with her situation as a *feme covert*. His position is a fiduciary one, so that he cannot purchase from a coadministratrix without consent of all beneficiaries in interest.¹

An administrator cannot sue in his representative character upon contracts made after the death of the intestate merely in the course of carrying on the intestate's business. Hence the husband must sue alone, for goods supplied by husband and wife, in carrying on the business of the wife's father, whose administratrix the wife was; and the joinder of the wife is improper.²

By marriage with a female guardian, too, the husband becomes responsible for the moneys with which she may then or afterwards during coverture be chargeable in such capacity; the responsibility extending while she continues to act, whether it were proper for her to so continue or not.³

CHAPTER V.

EFFECT OF COVERTURE UPON THE WIFE'S CHATTELS REAL AND REAL ESTATE.

§ 164. **Husband's Interest in Wife's Chattels Real, Leases, &c.**— Chattels real, such as leases and terms for years, have many of the incidents of personal property. But as between husband and wife they differ from personal chattels. The title acquired therein by the husband is of a somewhat anomalous nature; for upon them marriage operates an executory gift, as it were, the husband's title being imperfect unless he does

See *Airhart v. Murphy*, 82 Tex. 181; *Cassedy v. Jackson*, 45 Miss. 397. Wife made sole executrix with her husband's consent. *Stewart, In re*, 56 Me. 300. As to effect on chattels real where wife is executrix, see also *post*, § 164.

¹ *Pepperell v. Chamberlain*, 27 W. R. 410.

² *Bolingbroke v. Kerr*, L. R. 1 Ex. 222.

³ *Allen v. McCullough*, 2 Heisk. 174.

some act to appropriate them before the wife's death. He may sell, assign, mortgage, or otherwise dispose of his wife's chattels real without her consent or concurrence;¹ excepting always such property as she may hold by way of settlement or otherwise as her separate estate.² Chattels real, unappropriated during coverture, vest in the wife absolutely, if she be the survivor. In all these respects they resemble *choses in action*. But if the husband be the survivor, such chattels will belong to him *jure mariti*, and not as representing his wife. And in this respect they resemble *choses in possession*.

As to the wife's chattels real, therefore, husband and wife are in possession during coverture by a kind of joint tenancy, with the right of survivorship each to the other; not, however, like joint tenants in general, but rather under the title of husband and wife; since husband and wife are, in contemplation of law, but one person, and incapable of holding either as joint tenants or tenants in common.³

The wife's chattels real may be taken on execution for the debts of the husband while coverture lasts, by which means the title becomes transferred by operation of law to the creditor, and the wife's right, even though she should survive her husband, is gone.⁴ They may also be bequeathed by the husband by will executed during marriage, or by other instrument to take effect after his death; with, however, this result: that if the wife dies first the bequest will be effectual, not having been subsequently revoked by the husband; while, if the husband dies first, the wife will take the chattel in her own right, unaffected by any will which he may have made, or by any charge he may have created.⁵

It would appear that any assignment of a chattel real by the husband will completely appropriate it, even though made without consideration.⁶ And if a single woman has a decree

¹ Co. Litt. 46c; 2 Kent Com. 134; Sir Edward Turner's Case, 1 Vern. 7; Whitmarsh v. Robertson, 1 Coll. New Cases, 570. As to what are chattels real, see 1 Schouler Pers. Prop. 29, 45-73.

² Tullett v. Armstrong, 4 M. & C. 895; Draper's Case, 2 Freem. 29; Bullock v. Knight, Ch. Ca. 266.

³ 2 Kent Com. 135; Co. Litt. 351b; Butler's note 304 to Co. Litt. lib. 3, 351a.

⁴ 2 Kent Com. 184; Miller v. Williams, 1 P. Wms. 258.

⁵ Co. Litt. 351a, 466; Roberts v. Polgrean, 1 H. Bl. 535.

⁶ Cateret v. Paschall, 8 P. Wms. 200. But see note to 1 P. Wms. 380.

to hold and enjoy lands until a debt due her has been paid, — known at the old law as an estate by *elegit*, — and she afterwards marries, her husband may make a voluntary assignment so as to bind her.¹ The right of appropriating the wife's chattels real is, therefore, to be distinguished from the right of reducing things in action into possession. The husband's interest in his wife's chattels real may be called an interest in his wife's right, with a power of alienation during coverture; and an interest in possession, since such chattels are already in possession, but lying in action.²

As the husband is entitled to administer in his wife's right when she is executrix or administratrix, he may release or assign terms for years or other chattels real vested in her as such.³ But if he be entitled to a term of years in his wife's right as executrix or administratrix, and have the reversion in fee in himself, the term will not be merged; for, to constitute a merger, both the term and the freehold should vest in a person in one and the same right.⁴

An exception to the husband's right by survivorship to his wife's chattels real occurs in case of joint tenancy. If a single woman be joint tenant with another, then marries and dies, the other joint tenant takes to the exclusion of her husband surviving her; for the husband's title is the newer and inferior one.⁵

Where, during coverture, a lease for years is granted to the wife, adverse possession, which commences during coverture, may be treated as adverse either to the wife or to the husband.⁶

When the husband succeeds to his wife's chattel real upon surviving her, or appropriates it during coverture, he takes it subject to all the equities which would have attached against her. In other words, being not a purchaser for a valuable consideration, he can claim no greater interest than she had. Thus, where the wife's chattel interest is subject to the pay-

¹ *Merriweather v. Brooker*, 5 Litt. 256; *Paschall v. Thurston*, 2 Bro. P. C. 10.

² *Mitford v. Mitford*, 9 Ves. 98.

³ *Arnold v. Bidwood*, Cro. Jac. 318; 435. *Thrustout v. Coppin*, W. Bl. 801.

⁴ Co. Litt. 338 b; 1 Bright Hus. & Wife, 97, and cases cited.

⁵ Co. Litt. 185 b.

⁶ *Doe v. Wilkins*, 5 Nev. & M.

ment of an annuity, the husband must continue to make payment so long as the incumbrance lasts. And though he may not in all cases be bound on her covenant to make new leases, yet if he does so the equity of the annuitant will attach upon them successively.¹

§ 165. **Husband's Interest in Wife's Chattels Real; Subject continued; Right to Alienate.**—The law enables the husband during coverture to defeat his wife's interest by survivorship by an absolute alienation or disposition of the whole term, either with or without consideration.² And the same rule applies to the wife's trust terms as to her legal terms.³ In order to make it effectual, the right of the party in whose favor the disposition is made must commence *in interest* during the life of the husband; but it is not necessary that it should commence *in possession* during that period. Thus the husband, though he cannot bequeath these chattels by will, as against the wife's right by survivorship, may grant an underlease for a term not to commence until after his death; and this act will divest the right of the wife under the original lease so far as the underlease is prejudicial to such right.⁴ Nor need his disposition cover the whole chattel, since the disposition necessarily operates *pro tanto*.⁵ Nor need it be absolute, since a conditional disposition is good if the condition subsequently takes effect.⁶ And the law enables the husband to dispose not only of the wife's interest in possession, but also of her possibility or contingent interest in a term, unless where the contingency is of such a nature that it cannot happen during his life.⁷

A distinction is, however, made between cases where the

¹ *Moody v. Matthews*, 7 Ves. 188; *Packer v. Windham*, Prec. in Ch. 412. *Rowe v. Chichester*, Amb. 719. On the question of contribution by annuitants, see *Winslowe v. Tighe*, 2 Ball & B. 204; *Hubbs v. Rath*, 2 ib. 553.

² 1 *Bright Hus. & Wife*, 98; *Grute v. Locroft*, Cro. Eliz. 287; *Jackson v. McConnell*, 19 Wend. 175.

³ *Tudor v. Samyne*, 2 Vern. 270 (incorrectly reported, according to note, 1 *Bright Hus. & Wife*, 99); *Sir Edward Turner's Case*, 1 Ch. Ca. 307;

⁴ *Grute v. Locroft*, Cro. Eliz. 287; *Bell Hus. & Wife*, 104, 105.

⁵ *Sym's Case*, Cro. Eliz. 33; *Loftis's Case*, ib. 276; *Riley v. Riley*, 4 C. E. Green, 229.

⁶ *Co. Litt.* 46 b. But see 4 Vin. Abr. 50, pl. 14.

⁷ *Doe d. Shaw v. Steward*, 1 Ad. & El. 800; 1 *Bright Hus. & Wife*, 100. And see *Donne v. Hart*, 2 Russ. & My. 380.

disposition is intended of the whole or of part of the property, and where it is intended as a collateral grant of something out of it. In the latter case the transaction will not bind the wife; for if she survive her husband, her right being paramount, and her interest in the chattel not having been displaced, she will be entitled to it absolutely free from such incumbrance.¹

§ 166. **Husband's Interest in Wife's Chattels Real; Subject continued; Acts defeating Wife's Rights.** — The husband may by other acts than express alienation divest his wife's title, and defeat her rights by survivorship in her chattels real. Thus, if the husband, holding a term in right of his wife, grant a lease of the lands covered by the term, for the lives of himself and his wife, the wife's term will thereby merge, and her right in it be defeated.² Or if, while in possession, under a lease to himself and the wife, the husband should accept from the lessor a feoffment of the lands leased, the term would be extinguished and the wife's right along with it; for the livery would amount to a surrender of the term.³

On the other hand, there are acts by the husband, which, although they amount to the exercise of an act of ownership, yet, as they do not pass the title, will not defeat the wife's right by survivorship. An instance of the latter is that of the husband's mortgage of his wife's chattels real; or, what is the same thing in equity, a covenant to mortgage. This is in reality a disposition as security, and until breach of condition the mortgagee has no further title. But, in order to protect the mortgagee's rights, equity treats the mortgage or covenant as good against the wife to the extent of the money borrowed; that once paid, the chattels will continue hers.⁴ After breach of condition, the mortgagee's estate becomes absolute; or, at least, he can make it so by foreclosure; and the alienation of the term being then completed at law, the wife's legal right by survivorship is defeated; subject, how-

¹ Co. Litt. 184*b*; 1 Bright Hus. & 912. And see *Lawes v. Lumpkin*, 18 Wife, 103. Md. 334.

² 2 Roll. Abr. 495, pl. 50.

³ *Downing v. Seymour*, Cro. Eliz. ⁴ *Bates v. Dandy*, 2 Atk. 207; *Bell Hus. & Wife*, 107; 1 Bright Hus. & Wife, 106.

ever, to the equity of redemption, where the husband has not otherwise disposed of that likewise.¹ So, too, transactions, not constituting mortgages in the ordinary sense of the term, may yet be so construed in equity where such was their substantial purport. And while the intention of the husband to work a more complete appropriation will be justly regarded by the court, the mere circumstance of a proviso in the conveyance for redemption, pointing to a mode of reconveyance not in conformity with the original title, will not, it seems, debar the wife from asserting her rights by survivorship.²

As to the wife's equity for a settlement, however, it is held that where a husband mortgages the legal interest in a term of years belonging to him in right of his wife, no such equity arises on a claim to foreclose this mortgage against the husband and wife as defendants.³

Among the miscellaneous acts of the husband, which will defeat the wife's survivorship to her chattels real, are the following: A disseverance of his wife's joint tenancy during coverture.⁴ An award of the term to the husband, if carried into effect.⁵ The husband's criminal acts; such as attainder.⁶ So, too, his alienage.⁷ Lord Coke considered that ejectment recovered by the husband in his own name would work appropriation; but he was probably in error.⁸ Waste operates as a forfeiture of a term.⁹ And finally, the husband's creditors may sell the wife's chattels real on execution, and by their own act determine her interest altogether.¹⁰ But it is held that the wife's survivorship is not defeated by such acts of her husband as erecting buildings on the leasehold premises; and making a mortgage, sale, or lease of part bars the wife only so far.¹¹

¹ See *Pitt v. Pitt*, T. & R. 180; 1 Prest. on Estates, 345.

² *Clark v. Burgh*, 9 Jur. 679. And see *In re Betton's Trust Estates*, L. R. 12 Eq. 558; *Pigott v. Pigott*, L. R. 4 Eq. 549.

³ *Hill v. Edmonds*, 15 E. L. & Eq. 280.

⁴ Co. Litt. 185b; Plow. Com. 418.

⁵ *Oglander v. Baston*, 1 Vern. 396; note of Jacob to 1 Roper Hus. & Wife, 185, and cases commented upon.

⁶ Co. Inst. 351a; 4 Bl. Com. 387; *Steed v. Cragh*, 9 Mod. 43.

⁷ 2 Bl. Com. 421; 4 Bl. Com. 387. See post, § 169.

⁸ See Jacob's note to 1 Roper Hus. & Wife, 185; Co. Litt. 46b; 4 Vin. Abr. 50, pl. 18.

⁹ Co. Litt. 851.

¹⁰ *Miles v. Williams*, 1 P. Wms. 258; Co. Litt. 851.

¹¹ *Riley v. Riley*, 4 C. E. Green, 229.

§ 167. **Effect of Coverture upon Wife's Real Estate; General Rule.** — Now, as to the effect of coverture on the wife's real estate. By marriage, the husband becomes entitled to the usufruct of all real estate owned by the wife at the time of her marriage, and of all such as may come to her during coverture. He is entitled to the rents and profits during coverture. His estate is, therefore, a freehold. But it will depend upon the birth of a child alive during coverture, whether his estate shall last for a longer term than the joint lives of himself and wife, or not; that is to say, whether he acquires the right of curtesy initiate, to be consummated on the death of the wife leaving him surviving.¹ In the event of such birth, his interest lasts for his own life, whether his wife dies before him or not. If there be no child born alive, his interest lasts only so long as his wife lives. In either case, he has not an absolute interest, but only an estate for life, and his right is that of beneficial enjoyment. When his estate has expired, the real estate vests absolutely in the wife or her heirs, and the husband's relatives have no further concern with it.²

While, therefore, the husband has the beneficial enjoyment of his wife's freehold property during coverture, at the common law, the ownership remains in the wife. Herein, her right becomes suspended, not extinguished, by her marriage. The inheritance is in her and her heirs.

Consequently, the husband may collect and dispose of the rents. He may also sue in his own name for injury to the profits of his wife's real estate; as where growing crops are destroyed or carried off; for this relates to his usufructuary interest. But for injuries to the inheritance, such as trespass, by cutting trees, burning fences, and pulling down houses, and generally in actions for waste, the wife must be joined; and if the husband dies before recovering damages, the right of action survives to the wife. And if the wife survives her husband, she may commence such suits without joining

¹ See *post*, Dissolution by Death, as to Curtesy.

² Co. Litt. 351 a; 2 Kent Com. 130; 1 Bac. Abr. 286; Junction Railroad Co. v. Harris, 9 Ind. 184; Clarke's Appeal, 79 Penn. St. 376; Rogers v. Brooks, 80

Ark. 612. The husband's rights and liabilities attach to property bought by himself and held in his name as trustee for his wife. *Pharis v. Leachman*, 20 Ala. 662. But not, as will be seen hereafter, to his wife's separate real estate.

his personal representatives.¹ But the husband cannot prosecute such an action alone after his wife's death during the pendency of the suit.² Husband and wife are properly joined as plaintiffs in a bill to protect and secure the permanent rights and interests to her real estate.³

It is held that the husband can sue intruders alone for digging up the soil and carrying it away,⁴ or generally for forcibly entering the premises.⁵

Besides the rents and profits during coverture, the husband, if the survivor, is entitled to all arrears accrued up to the time of his wife's death. Such property is not treated like the wife's *choses in action*, not reduced to possession. Accordingly, he may maintain suit after coverture to recover all rents and profits which had accrued while coverture lasted. And where the wife joins her husband in a lease, the covenant for payment of rent is for the husband's benefit alone while the usufruct continues.⁶ But it would appear to be otherwise where rent is reserved to husband and wife, and *her* heirs and assigns.⁷

In all cases, emblements or growing crops go to the husband or his representatives at the termination of his estate.⁸ This rule was extended at the common law to cases of divorce *causa precontractus*.⁹ But it does not apply to divorce for the husband's misconduct under modern statutes.¹⁰ The husband's lease in right of his wife operates so far in the tenant's favor as to entitle the latter to emblements.¹¹ The rule is the same whether the husband be tenant by curtesy or not. No action, therefore, can be maintained by the wife in such cases.

¹ 2 Kent Com. 131; *Weller v. Baker*, 2 Wils. 423, 424; *Beaver v. Lane*, 2 Mod. 217; *Bac. Abr. tit. Baron & Feme*, K.; 1 Chit. Pl. (6th Am. ed.) 85; 1 Bl. Com. 362; *Illinois, &c. R. R. Co. v. Grable*, 46 Ill. 445; *Thacher v. Phinney*, 7 Allen, 146.

² *Buck v. Goodrich*, 33 Conn. 87.

³ *Wyatt v. Simpson*, 8 W. Va. 394.

⁴ *Tallmadge v. Grannis*, 20 Conn. 296.

⁵ *Alexander v. Hard*, 64 N. Y. 223.

⁶ 1 Washb. Real Prop. 44; *Co. Litt. 351b*; *Jones v. Patterson*, 11 Barb. 572; *Matthews v. Copeland*, 79 N. C. 493.

⁷ *Hill v. Saunders*, 4 B. & C. 529. The wife need not be joined in such suits for rent. *Clapp v. Houghton*, 10 Pick. 463; *Beaver v. Lane*, 2 Mod. 217; *Shaw v. Partridge*, 17 Vt. 626; *Edrington v. Harper*, 3 J. J. Marsh. 360; *Bailey v. Duncan*, 4 Monr. 260.

⁸ *Reeve Dom. Rel.* 28, and cases cited; *Weems v. Bryan*, 21 Ala. 302; *Spencer v. Lewis*, 1 Houst. 223.

⁹ *Orland's Case*, 5 Coke, 116a.

¹⁰ See *Vincent v. Parker*, 7 Paige, 65, per Chancellor Walworth; *Jenney v. Gray*, 5 Ohio St. 45.

¹¹ *Rowney's Case*, 2 Vern. 322; *Gould v. Webster*, 1 Vt. 409.

Where, pending an action of ejectment brought by husband and wife to recover possession of land to which they were entitled in right of the wife, the husband dies, the right to the rent current and in arrear, and also to damages for waste, survives to the wife; and as to rents accruing after the wife dies also, these go to her heirs and devisees.¹

§ 168. *Wife's Real Estate; Husband's Life Interest, how Lost.* — The husband's interest in his wife's real estate is liable for his debts, and may be taken on execution against him. But nothing more than the husband's usufruct is thereby affected; nor can the attachment or sale affect the wife's ultimate title.² The rule in Massachusetts is to allow the purchaser to take the rents and profits for a definite period, or the whole life estate, at an appraisal of the value founded on a proper estimate of the probability of human life. But where the whole life estate is of more value than the amount of the execution, the more proper, and perhaps the only mode, is the former.³ It has been held that the husband, under a *bona fide* deed of separation, without trustees, executed before judgment, may relinquish to his wife all interest in her lands, and thus avoid the demands of his creditors upon the property, even though an annuity be reserved to himself.⁴ And it is certain that the sheriff's deed cannot convey a greater interest than the defendant has at the time of attachment or of levy and sale.⁵ Therefore, where a statute allows the husband a distributive share in his wife's lands in the event of his survivorship, no such interest passes to the purchaser of lands sold on execution for his debts during her life.⁶ Since the husband's life interest is liable for his own debts, it is liable for the debts of

¹ King v. Little, 77 N. C. 138.

² 2 Kent Com. 131; Babb v. Perley, 1 Me. 6; Mattocks v. Stearns, 9 Vt. 326; Perkins v. Cottrell, 15 Barb. 446; Brown v. Gale, 5 N. H. 416; Canby v. Porter, 12 Ohio, 79; Williams v. Morgan, 1 Litt. 168; Nichols v. O'Neill, 2 Stockt. 88; Montgomery v. Tate, 12 Ind. 615; Lucas v. Rickerich, 1 Lea, 726; Sale v. Saunders, 24 Miss. 24; Cheek v. Waldrum, 25 Ala. 162; Schneider v. Starke, 20 Mis. 269. But see Jackson v. Suffern, 19 Wend. 175.

And see Rice v. Hoffman, 35 Md. 844, as to the liability extending to the husband's interest as tenant by the curtesy.

³ Litchfield v. Cadworth, 15 Pick. 28.

⁴ Bonslaugh v. Bonslaugh, 17 S. & R. 361. But see Bowyer's Appeal, 21 Penn. St. 210.

⁵ Williams v. Amory, 14 Mass. 20; Johnson v. Payne, 1 Hill, 111; Rabb v. Aiken, 2 McC. Ch. 119.

⁶ Starke v. Harrison, 5 Rich. 7.

the wife *dum sola*.¹ And it is held in Pennsylvania that where a husband has conveyed his life estate in fraud of his creditors, they may levy upon the growing crops.²

A husband's life estate may be barred by a statute of limitations like other freehold interests.³ At the common law, attainder of treason or other felony worked a forfeiture or escheat of real estate to the government. And corruption of blood affected the inheritance in such cases. But as regarded the wife's real estate, nothing more could be taken than the husband's life interest: the freehold continued in the wife as before. For the same reason, where the wife was at common law attainted of felony, the lord might enter to the lands by escheat, and eject the husband whenever the crown had had its prerogative forfeiture of a year and a day's waste.⁴ The common law of attainder is of no force in this country so far as forfeiture and corruption of blood is concerned; but it probably applies to the husband's life interest in his wife's lands.⁵

§ 169. *Wife's Real Estate; Where no Life Interest is acquired.*—Where the husband was an alien he could not acquire an interest in his wife's real estate at the common law.⁶ But the disability is now removed in great measure by statute.⁷

At common law, too, the marital rights of the husband do not attach to realty in which the wife has only a remainder or reversion expectant upon the termination of a precedent life estate.⁸ Mere contingencies of the wife, which cannot happen before the death of either spouse, cannot be attached, therefore, by creditors of the husband;⁹ nor landed expectancies in general while continuing expectant.¹⁰

¹ *Moore v. Richardson*, 37 Me. 438. Concerning the wife's debts *dum sola*, or antenuptial debts, see *supra*, c. 2.

² *Stelman v. Huber*, 21 Penn. St. 260.

³ *Kibbie v. Williams*, 58 Ill. 30.

⁴ *Bell Hus. & Wife*, 149, 150; 2 Bl. Com. 253, 254. As to the wife's right of dower in such cases, see 2 Bl. Com. 253, and notes by Chitty and others.

⁵ See Const. U. S. Art. III. § 3.

⁶ *Washb. Real Prop.* 48, and cases cited; *Bell Hus. & Wife*, 151; *Co. Litt.*

81 b; *Menvill's Case*, 13 Co. 293; 2 Bl. Com. 293; 2 Kent Com. 39–75.

⁷ See note to 1 *Washb. Real. Prop.* 49, giving statutory changes. And see *Bell Hus. & Wife*, 151, 241. Stat. 7 & 8 Vict. c. 66, removes disabilities as to dower for the most part.

⁸ *Baker v. Flournoy*, 58 Ala. 650.

⁹ *Hornsby v. Lee*, 2 Madd. Ch. 16; *Allen v. Scurry*, 1 Yerg. 36; *Sale v. Saunders*, 24 Miss. 24.

¹⁰ *Osborne v. Edwards*, 8 Stockt. 73; *Baker v. Flournoy*, 58 Ala. 650.

§ 170. **Wife's Real Estate; Husband's Right to convey or lease.** — The husband alone has power at common law to bind or alienate the wife's lands during coverture. This right lasts, at any rate, during their joint lives (provided the parties are not in the mean time divorced); and if the husband becomes a tenant by curtesy, it lasts during his whole life. But the husband's power is commensurate with his estate. He cannot incumber the property beyond the period of his life interest, nor prevent his wife, if she survives him, or her heirs after his death, from enjoying the property free from all incumbrances which he may have created.¹ Under the ancient law of tenures the husband could transfer the property so as to vest it in the grantee, subject to the wife's entry by writ *cui in vita*; for his act amounted to a discontinuance. Statute 32 Hen. VIII. c. 28, was remedial in its effect, so far as to give the wife her writ of entry, notwithstanding her husband's conveyance. Copyhold lands followed a different rule, not being considered within the letter or the equity of this statute. But by the more recent statutes of 3 & 4 Will. IV. c. 27, and c. 74, and 8 & 9 Vict. c. 106, fines and recoveries have been abolished and feoffments deprived of their tortious operation; and it is enacted that no discontinuance or warranty made after the 31st day of December, 1833, shall defeat any right of entry or action for the recovery of land. At the present day there is, therefore, no mode of conveyance in the English law by which the husband can convey more than his own estate in his wife's lands.²

These latter statutes are not, *per se*, of force in this country, for they were passed in England after the colonization of America. But the same result has been very generally reached in this country through a different process. In Massachusetts, the statute of 32 Hen. VIII. is still in force as a modification and amendment to the common law.³ In other States, ejectment or other summary process may be resorted to.⁴ The universal doctrine, whatever may be the

¹ 2 Kent Com. 133.

² Bruce v. Wood, 1 Met. 542.

³ 1 Bright Hus. & Wife, 162-168, and authorities cited; Bell Hus. & 264; N. Y. Rev. Stats. 4th ed. vol. 2, Wife, 196; Robertson v. Norris, 11 p. 303; 2 Kent Com. 133, n. Q. B. 916.

⁴ Miller v. Shackelford, 4 Dana,

form of remedy, prevails, that the husband can do no act nor make any default to prejudice his wife's inheritance. And while his own alienation passes his life estate, it can do no more; and the wife, notwithstanding, may enter after his death and hold possession.¹

So far as the effect of the husband's lease was concerned, the statute 32 Hen. VIII. c. 28, changed the old common law. By this statute, husband and wife are permitted to make a joint lease of the wife's real estate for a term not exceeding three lives or twenty-one years. There were, however, some restrictions placed upon the operation of this statute. Thus, it was further declared that things which lie *in grant*, such as franchises, should be excepted; though tithes followed the general principle. And the old lease must have been surrendered either in writing or by operation of law within one year from making the new lease. Property in possession might be leased under the statute, but not property in reversion. The lease would not exempt the tenant from responsibility for waste. And the rent reserved should not be less than the average rent of the preceding twenty years. This statute has been strictly construed both in the common law and equity courts of England.²

But the husband's lease of the wife's lands, whether alone or jointly with her, may be good at the common law, though not made in compliance with the statute. In such case the wife may affirm or disaffirm the lease at the expiration of coverture. And the same right may be exercised by her issue, or by others claiming under her or in privity with her. So, too, where she marries again after her husband's death, her second husband has the privilege of election in her stead. But one who claims by paramount title to the wife, as, for instance, a joint tenant surviving her, cannot exercise this right.³

¹ 2 Kent Com. 133, n.; 1 Washb. Real Prop. 279; Butterfield v. Beall, 3 Ind. 203; Huff v. Price, 50 Mis. 228; Jones v. Carter, 73 N. C. 148.

² Bell Hus. & Wife, 179-181; 1 Bright Hus. & Wife, 193-219; Darlington v. Pulteny, Cowp. 267.

³ Bell Hus. & Wife, 175, 177; Jeffrey v. Guy, Yelv. 78; Smalman v. Agborow, Cro. Jac. 417; Anon., 2 Dyer, 159. See also Toler v. Slater, L. R. 8 Q. B. 42, where the lessee was held bound on his covenant to pay rent.

Some acts of the wife, on being released from coverture, will amount to an affirmance of her husband's informal lease. Thus acceptance of rent from the tenant, after her husband's death, will confirm the lease.¹ But parol leases of the wife's real estate are affected by the statute of frauds; and not even acceptance of rent can bind the wife surviving: the lease will be treated as utterly void at the husband's death, and not voidable only.² Whether acceptance of rent by the wife after the husband's death would confirm a lease in writing, made by the husband alone, is a question on which the authorities are not agreed.³

A distinction, however, is sometimes made between leases for life and leases for terms of years, when made by the husband alone. The former, it is said, being freehold estates and commencing by livery of seisin, could only be avoided by entry; while the latter became void absolutely on the husband's death. But according to the better authority both kinds of leases follow the same principle, and are not void but voidable at the husband's death.⁴

§ 171. *Wife's Real Estate; Husband's Mortgage; Waste.* — The husband's mortgage of his wife's real estate is effectual to the same extent as his absolute conveyance; that is to say, it will operate upon his life estate or the joint life estate of himself and his wife, as the case may be, and no further. And his lease of the wife's lands for a term of years, for the purpose of creating an incumbrance in the nature of a mortgage, is treated in equity as a mortgage; and the wife's acceptance of rent after his death cannot make such a lease other than void on the termination of his life estate.⁵

¹ *Doe v. Weller*, 7 T. R. 478.

² *Bell Hus. & Wife*, 178. And see *Winstell v. Hehl*, 6 Bush. 58.

³ *Bell Hus. & Wife*, 177, and cases cited; Preamble to Stat. 32 Hen. VIII. c. 28; *Jordan v. Wikes*, Cro. Jac. 332; *Bac. Abr. Leases*, C. 1. See *Wolton v. Hele*, 2 Saund. 180, n. 10; *Bro. Abr. Acceptance*, 1; *Dixon v. Harrison*, Vaugh. 40; *Goodright v. Straphan*, 1 Cowp. 201; *Perry v. Hindle*, 2 Taunt. 180; *Hill v. Saunders*, 2 Bing. 112.

⁴ *Bell Hus. & Wife*, 177, 178, and cases cited; *contra*, notes to 2 Kent Com. 133, and authorities referred to, including note of Sergt. Williams to *Wolton v. Hele*, 2 Saund. 180.

⁵ *Bell Hus. & Wife*, 193, 194; *Goodright v. Straphan*, 1 Cowp. 201; *Drybutter v. Bartholomews*, 2 P. Wms. 127. The husband's mortgage, in this country also, passes only his life estate, under the like circumstances. *Miller v. Shackleford*, 3 Dana, 291; *Barber v. Harris*, 15 Wend. 615; *Railroad Co.*

The wife's remedy for waste deserves a passing notice. Waste consists in such acts done by a tenant for life or years to the estate he holds, as injure or impair the inheritance. Since the husband holds his wife's real estate as a life tenant only, it would seem on principle that he ought to be held liable for waste like other life tenants. A difficulty occurs, however, in applying the remedy; and since the common-law action of waste is founded on the privity of parties competent to sue one another, no such suit can be technically maintained as between husband and wife.¹ But if the husband conveys to a third party, and such third party commits waste, the action will lie. So when waste is committed by the husband's creditor who has taken his freehold interest on execution.² As the husband cannot commit waste, it follows that he cannot sell growing timber on her land except to a very limited extent.³ The heir of the wife can sue the husband for waste; though it would seem that he cannot sue the husband's assignee for want of privity.⁴ The wife is not without remedy against her husband, however, for chancery will interfere on her behalf by injunction, and stop him from committing waste upon her land; and this is now the usual remedy against life tenants.⁵ And at the common law the husband was said to forfeit his term by such misconduct.⁶

§ 172. *Wife's Real Estate; Husband's Dissent to Purchase, &c.; Conversion.* — The husband may dissent from a purchase, gift, or devise of real estate to his wife during coverture; since otherwise he might be made a life tenant to his own disadvantage. But by such dissent he cannot and ought not to defeat her ultimate title as heir.⁷ Nor on principle should he be permitted to dissent to any purchase, gift, or devise to the wife's separate use, by the terms of which his own interest as life tenant is legally excluded. Subject to the husband's

v. Harris, 9 Ind. 184; *Kay v. Whittaker*, 44 N. Y. 565.

¹ 2 Kent Com. 181, 132; 1 Washb. Real Prop. 118-124; 1 Bright Hus. & Wife, 110.

² *Babb v. Perley*, 1 Me. 6; *Matstocks v. Stearns*, 9 Vt. 326.

³ *Stroebe v. Fehl*, 22 Wis. 337; *Porch v. Fries*, 3 C. E. Green, 204.

⁴ *Walker's Case*, 3 Coke, 59; *Bates v. Shraeder*, 13 Johns. 260.

⁵ See 1 Washb. Real Prop. 125; *ib.* 281.

⁶ Co. Litt. 351; 1 Bright Hus. & Wife, 110, 169.

⁷ Co. Litt. 8 a; 1 Dane Abr. 388;

4 *ib.* 397; 1 Washb. Real Prop. 280.

dissent and the wife's disagreement after her coverture ends, a conveyance to the wife in fee is always good.¹

If the real estate of the wife be converted into personalty during her life by a voluntary act of the parties, the proceeds become personal estate, and the husband may reduce into his own possession or otherwise take the proceeds. This principle has already been noticed.² But where conversion takes place by act of law, independently of husband and wife, the rule is not so clear. In New York, however, it is held³ that where the real estate of a married woman has been converted into personalty by operation of law during her lifetime, it will be disposed of by a court of equity, after her death, in the same manner as if she had herself converted it into personal property previous to her death.⁴ So, too, in some States, conversion of real estate, under partition proceedings, into personalty has been held complete where equity decreed partition, and the wife died after a final confirmation of the sale in court, all terms of sale having been complied with, and all formalities duly observed.⁵

On the other hand, the rule is announced that where a married woman is entitled to a legacy, and land is given her in lieu thereof, the husband having effected no prior reduction of the legacy, it is to be held as hers and for her sole benefit. A case of this sort was lately decided in Pennsylvania.⁶ And

¹ Co. Litt. 3 a, 356 b; 2 Bl. Com. 292, 298; 2 Kent Com. 150. The wife's privilege of disagreement to purchase extended to her heirs. 1b.

² *Supra*, § 156; *Hamlin v. Jones*, 20 Wis. 536; *Watson v. Robertson*, 4 Bush, 87; *Tillman v. Tillman*, 50 Mis. 40; *Sabel v. Slingluff*, 52 Md. 132; *Humphries v. Harrison*, 30 Ark. 79.

³ *Graham v. Dickinson*, 8 Barb. Ch. 170. In this case, *Flanagan v. Flanagan*, 1 Bro. C. C. 500, appears to have been disapproved.

⁴ *Graham v. Dickinson*, 8 Barb. Ch. 170.

⁵ *Jones v. Plummer*, 20 Md. 416; *Cowden v. Pitts*, 2 Baxt. 59. Where an administrator's sale of the wife's land is irregular, the husband cannot,

apart from the wife, confirm it, even though he has received the purchase-money. *Kempe v. Pintard*, 32 Miss. 324. See also *Ellsworth v. Hinds*, 5 Wis. 613; *Osborne v. Edwards*, 8 Stockt. 78. But a husband may demand and reduce into possession his wife's legacy, even though it be made payable, by the terms of a will, from proceeds of the sale of the testator's real estate. *Thomas v. Wood*, 1 Md. Ch. 296. Conversion takes place where husband and wife convey to trustees to sell and dispose for payment of debts, balance to be paid them as they shall direct or appoint. *Siter v. McClanahan*, 2 Gratt. 80.

⁶ *Davis v. Davis*, 46 Penn. St. 342. But see *Davis' Appeal*, 60 Penn. St. 118,

it is held that land purchased by a married woman with the proceeds of a legacy which the husband has declined to reduce into possession, is not liable for the husband's debts.¹

Where a husband is in possession of land with a claim of title, his title will not be affected by the act of a third person who pretends to put his wife into possession.² But the rule seems to be general that the husband's marital rights do not attach to property which is in the actual and rightful possession of another, and of which he cannot obtain possession during coverture without becoming a trespasser; notwithstanding the wife may have rights therein after his death.³ Where a wife elected to take land instead of money, in presence of the husband and with his assent, his subsequent entry into possession of the land must be regarded as an entry under the wife's title and not adverse to it.⁴ But lands continuing undisposed of, and belonging to an unsettled estate in which the wife acquires an undivided interest, the husband cannot reduce to possession to his wife's exclusion.⁵

§ 173. *Wife's Real Estate; Husband's Agreement to convey.*—By the old law of England it appears that if a husband agreed to convey real estate belonging to his wife, he might be compelled to execute the contract by getting her to levy a fine.⁶ This rule no longer holds good in that country.⁷ Even where the agreement has been made, not by the husband, but by the wife herself before her marriage, the agreement cannot now be enforced against the wife.⁸ But it is nevertheless binding upon the husband; though where the purchaser has not been misled, the husband cannot be made to convey his partial interest and submit to an abatement of

as to female ward's real estate treated as personalty, the guardian's mere change of investment having effected no conversion of the fund.

¹ *Coffin v. Morrill*, 2 Fost. 352. And see *Sims v. Spalding*, 2 Duv. 121.

² *Powell v. Felton*, 11 Ired. 469.

³ *Hair v. Avery*, 28 Ala. 267.

⁴ *Shallenberger v. Ashworth*, 25 Penn. St. 152.

⁵ *Hooper v. Howell*, 50 Ga. 165.

⁶ 2 *Bright Hus. & Wife*, 47; *Macq. Hus. & Wife*, 32.

⁷ *Frederick v. Coxwell*, 8 Y. & J. 514; *Emery v. Ware*, 8 Ves. 505; *Sug. V. & P.* 4th ed. 231; 2 *Story Eq. Juris.* 49-53; *Martin v. Mitchell*, 2 Jac. & W. 413; *Thayer v. Gould*, 1 Atk. 617; *Daniel v. Adams*, 1 Amb. 495. But see *Davis v. Jones*, 4 B. & P. 267.

⁸ Per Lord Ch. Cottenham, *Jordan v. Jones*, 2 Phill. 170. See *Rowley v. Adams*, 6 E. L. & Eq. 124.

the price, because of the wife's refusal to convey her real estate which he and she had promised to convey.¹

§ 174. *Wife's Real Estate; Wife's Agreement to convey, and her Conveyance; Mortgage, &c.* — An agreement by a *feme covert* for the sale of her real estate, the same not being her separate property, cannot be enforced at law or in equity against her.² And Sugden considers it doubtful whether a married woman, having a power of appointment, can thus bind herself.³ But modern statutes which permit the wife to convey with the observance of certain formalities often permit her generally to contract, to convey, and to incumber her lands.

Under the modern statute of 3 & 4 Will. IV. c. 74, which took effect in England from the end of the year 1833, married women are permitted to alienate or incumber their real estate by conveyances executed with their husbands pursuant to its provisions. This important law, with its later modifications, unfettered property which had long been fast bound.⁴ The statute requires the concurrence of the husband in such conveyances: also that the wife shall make an acknowledgment before certain judicial officers designated by the act, apart from her husband, to the effect that her own consent is freely and voluntarily given.⁵

In this country the custom of a wife's joining her husband in a deed of conveyance of her lands has prevailed from a

¹ *Griffin v. Taylor, Tothill*, 106; *Hall v. Hardy*, 3 P. Wms. 187; *Morris v. Stephenson*, 7 Ves. 474; *Castle v. Wilkinson*, L. R. 5 Ch. 584.

² *Macq. Hus. & Wife*, 32; *Emery v. Ware*, 5 Ves. 846; *Sug. V. & P.* 11th ed. 230.

³ *Sug. V. & P.* 11th ed. 231. She certainly cannot in some States. *Kennedy v. Ten Broeck*, 11 Bush, 241. But the wife cannot use her privilege in this respect unfairly, where the purchaser has become bound on his part. See *Cross v. Noble*, 67 Penn. St. 74.

⁴ See 8 & 9 Vict. c. 106.

⁵ See *Macq. Hus. & Wife*, 28-32; *ib.* Appendix, 1-47, where the provisions of this act, the rules of court made

in pursuance, and leading decisions on the construction of different sections, are fully given. And see *In re Dowling*, 18 C. B. n. s. 238. We have not thought it worth while to embody them in this work, as they have only a local application. There are many cases constantly arising in the English courts as to the interpretation of this statute, with its amendments; but they seem chiefly confined to the effect of the wife's acknowledgment. Previous to the statute of 3 & 4 Will. IV. c. 74, the wife could convey her interest only by levying a fine, which, as well as suffering recoveries, is abolished by that statute. 1 Washb. Real Prop. 280; 1 Wms. Real Prop. 88.

very early period. In most, if not all, of the States, there are statutes existing as to the mode of execution, which contemplate the joinder of husband and wife in the conveyance, and an acknowledgment by one or both of the parties.¹ Some of the States require a separate acknowledgment of the wife apart from her husband, and even a privy examination by the magistrate, so as to make sure that she is acquainted with the contents of the deed and acts freely and understandingly; but in this and other respects the laws are not uniform. There is less formality in general than under the English statute. Thus, then, does the wife pass title to her real estate.

And since in the tenure of lands and the mode of conveyance the law in this country has always varied considerably from that of England, the rights of married women in other respects may be different. Thus it would seem that the joint assent of husband and wife in accepting a title should be as good as in granting one.² And in New Hampshire it is held that a deed to a *feme covert*, made with her own and her husband's assent, vests the title legally in her.³ In Pennsylvania, if land conveyed to her be incumbered, it passes to her subject to that incumbrance.⁴ And in Vermont it has been held that a deed of gift to a wife during coverture, if accepted by her husband, is accepted by her, and that her refusal apart from him is of no consequence.⁵

But following the English doctrine, the wife's executory agreement to convey real estate, whether expressed by bond

¹ 1 Washb. Real Prop. 281, and cases cited; *Davey v. Turner*, 1 Dall. 15; *Jackson v. Gilchrist*, 15 Johns. 109; *Page v. Page*, 6 Cush. 196; 2 Kent Com. 151-155, and notes, showing custom in different States; *Albany Fire Ins. Co. v. Bay*, 4 Comst. 9; *Ford v. Teal*, 7 Bush. 156; *Mount v. Kesterson*, 6 Cold. 452; *Tourville v. Pierson*, 39 Ill. 446; *Deery v. Cray*, 5 Wall. 795; *Alabama, &c. Ins. Co. v. Boykin*, 38 Ala. 510; *Lindley v. Smith*, 46 Ill. 523; *Tubbs v. Gatewood*, 26 Ark. 128. The privy examination of a wife for ascertaining that she executes the deed

freely and without undue influence or compulsion of her husband is a feature of the legislation in many States; and the validity of her conveyance often turns upon a compliance with such a requirement. *Tubbs v. Gatewood*, *supra*; *Richardson v. Hittle*, 31 Ind. 119; *McCandless v. Engle*, 51 Penn. St. 309; *Tapley v. Tapley*, 10 Minn. 448.

² 1 Washb. Real Prop. 280.

³ *Gordon v. Haywood*, 2 N. H. 402. See *Leach v. Noyes*, 45 N. H. 364.

⁴ *Cowton v. Wickersham*, 54 Penn. St. 302.

⁵ *Brackett v. Wait*, 6 Vt. 411.

or simple instrument, is in this country held void in the absence of enabling statutes, like her general contracts, though made with her husband's assent; and specific performance cannot be enforced against her.¹ So it has been held in Vermont that the wife cannot, either separately or jointly with her husband, execute a valid power of attorney to convey her lands.² And a deed, in order to bind the wife's heirs, must have been delivered as well as executed, during her lifetime.³ Nor can her husband, after her decease, as against such heirs, confirm a conveyance which was fatally irregular on her part.⁴ If her conveyance be void, a note given in part-payment of the price is necessarily without consideration.⁵ And as she cannot bind herself to convey, neither can she be bound by her agreement to purchase.⁶ Nor will the law coerce her into fulfilling her agreement by granting exemplary damages against her husband.⁷

§ 175. *Wife's Conveyance of her Lands; Statute Formalities, &c.*—In some States the separate conveyance of a married woman, or her execution jointly with her husband, but without observance of the full statute formalities, is void.⁸ But in

¹ 2 Kent Com. 168; *Butler v. Buckingham*, 5 Day, 492; *Dankel v. Hunter*, 61 Penn. St. 382; *Stidham v. Matthews*, 29 Ark. 650; *Moseby v. Partee*, 5 Heisk. 26; *Holmes v. Thorpe*, 1 Halst. Ch. 415; *Lane v. McKeen*, 15 Me. 804. We make, of course, no reference here to the wife's *separate property*, or to her rights under what are known as the "married women's acts," to be considered *post*. See *Blake v. Blake*, 7 Iowa, 46. A contract to convey, made by husband and wife, may be good against the husband, though void as to the wife. *Steffey v. Steffey*, 19 Md. 5; *Johnston v. Jones*, 12 B. Monr. 326; 2 Kent Com. 168. See *supra*, § 100. Upon the strict assent of husband and wife, equity has sometimes decreed a sale under the wife's title bond. *Moseby v. Partee*, 5 Heisk. 26. As to the wife's ratification of the husband's unauthorized contract for the sale of her land, see *Ladd v. Hildebrandt*, 27 Wis. 135.

² *Sumner v. Conant*, 10 Vt. 1; *Gil-*

lespie v. Worford, 2 Cold. 632; *Hardenburgh v. Lakin*, 47 N. Y. 109.

³ *Thoenberger v. Zook*, 84 Penn. St. 24. But see *Ackert v. Pulis*, 7 Barb. 386; *Somers v. Pumphrey*, 24 Ind. 231.

⁴ *Dow v. Jewell*, 1 Fost. 470.

⁵ *Warner v. Crouch*, 14 Allen, 163.

⁶ *Robinson v. Robinson*, 11 Bush, 174. But though coverture is a good defence to a suit for specific performance, the wife will not be permitted to refuse a deferred payment of purchase-money and at the same time retain the land. *Staton v. New*, 49 Miss. 307.

⁷ *Burk v. Serrill*, 80 Penn. St. 413.

⁸ *Trimmer v. Heagy*, 16 Penn. St. 484; *Scarborough v. Watkins*, 9 B. Monr. 640; *Dow v. Jewell*, 18 N. H. 340; *Kerns v. Peeler*, 4 Jones, 226; *Wentworth v. Clark*, 83 Ark. 432; *Cincinnati v. Newell*, 7 Ohio St. 87; *Pratt v. Battels*, 28 Vt. 685; *Boyle v. Chambers*, 32 Mis. 46; *Berry v. Donley*, 26 Tex. 737; *Jewett v. Davis*, 10

others such irregularities are not held fatal to the instrument, and she is furthermore bound on the usual principles, even though her deed be separate from that of her husband and executed at a different time.¹ The question in such cases is mainly one of statute construction, and as to formalities a distinction may be taken between mere errors of description, or literal informalities of execution or acknowledgment on the one hand, and, on the other, the disregard of some statutory requirement, so as to substantially violate public policy, such, for instance, as her separate acknowledgment, or her declaration before the magistrate that she executed freely and understandingly for the purpose specified.²

The deed of a married woman as trustee is good against her heirs, claiming adversely to the trust, even though given without the assent of her husband. And a like deed executed under a power of attorney, granted by her alone, is equally valid.³

It is held a good deed of husband and wife where they are both named at the commencement of the deed as parties of the first part, and afterwards the parties of the first part are named as grantors.⁴ But a deed of the husband only where both execute and the husband alone is named as grantor in the body of the deed.⁵ The assent or joinder of the husband is in some States permitted to be subsequent instead of concur-

Allen, 68; *Baxter v. Bodkin*, 25 Ind. 172; *Bressler v. Kent*, 61 Ill. 426.

¹ *Albany Fire Ins. Co. v. Bay*, 4 Comst. 9; *Card v. Patterson*, 5 Ohio, 319; *Smith v. Perry*, 26 Vt. 279; *Strickland v. Bartlett*, 51 Me. 355; *Hornbeck v. Building Association*, 88 Penn. St. 64. In some States the wife must join, it is said, but she need not execute until years later, when it will take effect. *Stiles v. Probst*, 69 Ill. 382.

As to barring an estate tail in case of a married woman, see *Lippitt v. Huston*, 8 R. I. 415. The wife's title to lands vested in her under an unrecorded deed cannot be divested by her parol consent to its cancellation, and a new deed to her husband. *Wilson v. Hill*, 2 Beas. 148.

² See *Hamar v. Medsker*, 60 Ind. 418; *Little v. Dodge*, 82 Ark. 453; *Laughlin v. Fream*, 14 W. Va. 322; *Staton v. New*, 49 Miss. 307; *Rice v. Peacock*, 37 Tex. 392; *Marsh v. Mitchell*, 26 N. J. Eq. 497; *Wannell v. Kem*, 57 Mo. 478; *Thayer v. Torrey*, 37 N. J. L. 389; *Smith v. Elliott*, 39 Tex. 201; *Allen v. Lenoir*, 53 Miss. 321.

³ *Gridley v. Wynant*, 23 How. (U. S.) 500; *Holleman v. De Nyse*, 51 Ala. 95; *Lew. Trusts and Trustees*, 89, 90; *Sug. Pow.* 192, 196.

⁴ *Thornton v. National Exchange Bank*, 71 Mo. 221.

⁵ *McFadden v. Rogers*, 70 Mo. 421; *Heaton v. Fryberger*, 38 Iowa, 185.

rent, the wife not having sought to invalidate the deed meantime.¹ And even where the deed of the wife's land is expressed as hers alone, the husband's solemn execution and acknowledgment is held to fulfil requirements if her execution be in due form.²

Alteration of the deed, after execution, without the wife's consent, vitiates it as to those chargeable with knowledge of the fact.³ A separate examination is, under some codes, more insisted upon than a separate acknowledgment.⁴ If a certificate be defective, the magistrate should have the deed re-acknowledged.⁵ But contrary to the strict rule of most acts concerning the wife's acknowledgment, it is now permitted in some States, in case of a defective certificate, to prove due execution otherwise on her part.⁶ Where the official certificate shows that the wife acknowledged her execution after the statutory form, this is held to be in the nature of judicial evidence;⁷ and again it is pronounced only *prima facie* evidence of the separate examination and explanation requisite;⁸ but from either aspect it is not readily to be impeached by extraneous evidence, especially after the lapse of time, nor can the certificate be contradicted by parol testimony.⁹

Although estoppel may prevail against a husband in so many instances where the wife is not bound, his assent or joinder is of such importance in conveyances of the wife's land, where statutes do not permit her sole conveyance, that a deed by a man and wife of the wife's land, made when the husband is insane, is absolutely void.¹⁰

¹ Wing v. Schramm, 79 N. Y. 619; Marsh v. Mitchell, 26 N. J. Eq. 497. Call v. Perkins, 65 Me. 489.

² Thompson v. Lovrein, 82 Penn. St. 432.

³ Stone v. Lord, 80 N. Y. 60.

⁴ Kenneday v. Price, 57 Miss. 771.

⁵ Merritt v. Yates, 71 Ill. 636; Cahall v. Building Association, 60 Ala.

232. Proceedings for amending an officer's omission in the acknowledgment is permitted under some statutes.

Kilbourn v. Fury, 26 Ohio St. 153.

⁶ Terry v. Eureka College, 70 Ill. 236.

⁷ Kerr v. Russell, 69 Ill. 666; Pribble

v. Hall, 13 Bush, 61.

⁸ Hughes v. Coleman, 10 Bush, 246;

⁹ Leggate v. Clark, 111 Mass. 308.

Where husband and wife do not execute the deed of the wife's lands simultaneously, and simultaneous execution of their joint deed is not requisite, the deed cannot be regarded as delivered until after the wife has executed.¹

Fraud and deception used by the husband in procuring the wife's signature, or the failure of the officer to perform his duty according to the statute form of the acknowledgment and his own certificate, will not vitiate the deed as to the grantee and those claiming under him, in the absence of evidence tending to charge with seasonable notice thereof.² And even if the deed be defectively acknowledged, a married woman who has received consideration for the sale and dealt with the property has been estopped from availing herself of the defect afterwards; so that a bill in the nature of a bill to quiet title was entertained.³ But duress is of course good ground for avoiding the wife's deed, as against all who are chargeable with complicity or seasonable notice; such duress being established as to the particular execution.⁴ And the wife's irregular deed, if fatally defective, under the statute, on the face of it, should as a rule, like the deed of her land in the absence of statutes, be treated as a nullity, incapable of confirmation, and unenforceable against her either in law or equity;⁵ while she on her part, during coverture, or within a reasonable time after, may institute proceedings to regain possession;⁶ this rule having reference to the wife's lands held under common-law tenure, and not by way of the modern separate estate.

§ 176. **Wife's Mortgage of her Lands, &c.; Statute Formalities.**

—So, too, in this country, a married woman may mortgage as well as alienate her real estate by joining her husband in the conveyance and making due acknowledgment; and this, too, though no consideration pass to her thereby.⁷ Where

¹ *Stiles v. Probst*, 69 Ill. 382.

² *Pool v. Chase*, 46 Tex. 207; *White v. Graves*, 107 Mass. 325.

³ *Shivers v. Simmons*, 54 Miss. 520.

⁴ *Freeman v. Wilson*, 51 Miss. 320; *Kennedy v. Ten Broeck*, 11 Bush, 241.

⁵ See *Trimmer v. Heagy*, and other cases cited in this section, *supra*. The informal deed of her land cannot be

enforced as an equitable mortgage. *Whiteley v. Stewart*, 63 Mo. 360.

⁶ She may sue during coverture by next friend; though independently of statute she ought not to sue without her husband. *McCallum v. Petigrew*, 10 Heisk. 394.

⁷ *Eaton v. Nason*, 47 Me. 182; *Swan v. Wiswall*, 15 Pick. 126; *Whiting v.*

the wife joins her husband in a conveyance in the nature of a mortgage, she subjects her real estate to the risk of complete alienation by foreclosure for her husband's debt, or by sale under a power of sale thereby conferred. She is estopped by her own acts from denying the validity of the mortgage.¹ She may covenant that *scire facias* may issue in default of payment.² She may create a valid power in the mortgage to sell in default of payment.³ And in general she may convey upon condition and prescribe the terms.⁴ But independently of an express statute permission, and as our statutes generally run, the wife's mortgage without her husband's joinder or assent is void.⁵ And so is her assignment of a mortgage.⁶

§ 177. **Covenants in Wife's Statute Conveyance, Mortgage, &c.**—The rights of the wife are nevertheless in such cases treated with great consideration in our courts.⁷ In all cases the wife, who joins her husband in a mortgage of her own property to secure his debts or the payment of money loaned to him, is merely the surety of her husband, and is entitled to all the rights and privileges of a surety. This rule is well settled.⁸ And the fact that, by the terms of a mortgage, the surplus is to be paid to the husband after satisfying the mort-

Stevens, 4 Conn. 44; 1 Hill. Mort. 272; Demarest v. Wynkoop, 3 Johns. Ch. 144; 2 Kent Com. 167; Siter v. McClanachan, 2 Gratt. 280; Philbrooks v. McEwen, 29 Ind. 347; Moore v. Titman, 33 Ill. 353; McFerrin v. White, 6 Cold. 499; American, &c. Ins. Co. v. Owen, 15 Gray, 491; Newhart v. Peters, 80 N. C. 168.

¹ McCullough v. Wilson, 21 Penn. St. 436.

² Black v. Galway, 24 Penn. St. 18.

³ 2 Kent Com. 167; Vartie v. Underwood, 18 Barb. 561; Barnes v. Ehrman, 74 Ill. 402.

⁴ Demarest v. Wynkoop, 3 Johns. Ch. 129; 2 Kent Com. 167. So, too, in England. Pybus v. Smith, 1 Ves. Jr. 189; Essex v. Atkins, 14 ib. 542. See Gilbert v. Mayford, 1 Scam. 471; Ruscombe v. Hare, 2 Bligh, 192; Bird v. Davis, 1 McCart. 467.

⁵ Weed Sewing Machine Co. v. Emerson, 115 Mass. 554; Bressler v. Kent, 61 Ill. 426; Yager v. Merkle, 26 Minn. 429; Herdman v. Pace, 85 Ill. 345.

⁶ Moore v. Cornell, 68 Penn. St. 320.

⁷ See Bayler v. Commonwealth, 40 Penn. St. 37. "Will a court of equity interfere in favor of one who is an assignee or covenantee, but not for value, to enforce a wife's engagement to pay an old debt of her husband? The answer is plain. If it will not decree the performance of an ordinary agreement, not founded on a valuable consideration, much less will it enforce such a contract against a *feme covert*." Per Strong, J.; *ib.* p. 44.

⁸ Neimcewicz v. Gahn, 3 Paige, 614; Hawley v. Bradford, 9 Paige, 200; Vartie v. Underwood, 18 Barb. 561.

gage debt, and not to the wife or to the mortgagors jointly, will not repel the idea that the wife was or intended to be a surety.¹ The property actually mortgaged by her, and not her property in general, is thus subjected to the payment of her husband's note; and she cannot be held personally liable for any deficiency under the foreclosure sale.²

A wife is not bound by her warranty in a deed which she executes. Nor by any covenants contained therein. This is the general common-law rule in England and America.³ For this accords with the principle that married women are incapable of binding themselves by contract; and the effect of her conveyance under the statute is simply that she passes whatever title she had in the lands conveyed. Yet the husband may be bound on his part, where he joins her, notwithstanding.⁴ In England, where the wife formerly passed her real estate by suffering a fine, it was held long ago that if the grantee were evicted by a paramount title, the wife could be sued on her covenant of warranty after her husband's death.⁵ So, too, it was formerly said that the wife should be held bound on the covenants contained in a lease of her lands executed during coverture, with her husband, and affirmed by herself after his death, by such acts as the acceptance of rent;⁶ and this doctrine is certainly not unreasonable so far

¹ *Vartie v. Underwood*, 18 Barb. 561. But see *Dean v. Phillips*, 17 Ind. 406.

² See *Wolf v. Van Metre*, 23 Iowa, 397; *Logan v. Thrift*, 20 Ohio St. 62; *Howe v. Lemon*, 37 Mich. 164; *Hobson v. Hobson*, 8 Bush, 665. Her equity will be barred by regular sale under a power of sale mortgage, as under a sale by decree of chancery. *Strother v. Law*, 54 Ill. 418. Deed with certain simultaneous agreements may create, as against the wife, the relation of mortgagor and mortgagee, on the usual principles. *Ragan v. Simpson*, 27 Wis. 355. A mortgage executed in blank by the wife was held to be invalid in *Simms v. Hervey*, 19 Iowa, 278. And in general the statute formalities relating to conveyances must have been complied with. *Hait v. Houle*, 19 Wis. 472. As to agreements for extension,

see *Belloc v. Davis*, 38 Cal. 242. See further, *Holmes v. McGinty*, 44 Miss. 94. And as to the wife's equities in such mortgage, see also *Dissolution of Marriage by Death*, *post*.

³ 2 Kent Com. 167, 168; *Fowler v. Shearer*, 7 Mass. 21, per Parsons, C. J.; *Falmouth Bridge Co. v. Tibbetts*, 16 B. Monr. 637; *Den v. Demarest*, 1 Zab. (N. J.) 525; *Rawle Cov.* 573, 574; *Botsford v. Wilson*, 75 Ill. 133.

⁴ *Buell v. Shuman*, 28 Ind. 404; *Griner v. Butler*, 61 Ind. 362.

⁵ *Wotton v. Hele*, 2 Saund. 177; 1 Mod. 290. Chancellor Kent justly observes that this was a very strong case to show that she might deal with her land by fine as a *feme sole*. 2 Kent Com. 167.

⁶ 2 Saund. 80, note 9.

as a subsequent breach of covenant is concerned. But further than this courts would not probably go at this day.¹ And in this country the wife's covenants in a conveyance executed jointly, with her husband are considered binding upon her only by way of estoppel; and not so as to subject her to suit for damages.² And as she is not answerable for a breach of covenant, neither are her heirs or devisees.³ Indeed, in New York, the wife's privilege in this respect is carried much further, for she is permitted to execute a conveyance of land with her husband, containing a covenant of warranty on her part, and then to defeat the title by acquiring an adverse interest afterwards.⁴

§ 178. *Conveyance, under Statute, of Infant Wife's Lands.* — A deed of the wife's real estate, executed by husband and wife while the latter is under age, may be avoided by the wife within reasonable time after discoverture, though more than twenty years have elapsed;⁵ for this is analogous to the conveyance of an infant *feme sole* in respect of validity.⁶ But not, as it is held, where the wife, being apparently of full age, made oath that she was of age.⁷ As to the lapse of time permitted a wife for disaffirming the deed executed by her during infancy, the rule appears to be that a reasonable time should be allowed her after coverture has terminated by the death of her husband or their complete divorce, even though twenty or thirty years may meantime have elapsed since her attainment to majority.⁸

¹ Her covenant for quiet enjoyment in the lease of her lands will not bind her. *Foster v. Wilcox*, 10 R. I. 143.

² *Nash v. Spofford*, 10 Met. 192; *Jackson v. Vanderheyden*, 17 Johns. 167; *Dean v. Shelly*, 57 Penn. St. 426; *Hyde v. Warren*, 46 Miss. 13.

One's subsequent promise as widow to be answerable for a breach of covenant committed during her coverture is without consideration. *State Nat. Bank v. Robidoux*, 57 Mo. 446.

³ *Foster v. Wilcox*, 10 R. I. 443.

⁴ *Jackson v. Vanderheyden*, 17 Johns. 167; *Carpenter v. Schermerhorn*, 2 Barb. Ch. 814. And see *Shumaker v. Johnson*, 35 Ind. 33. *Contra*, *Colcord v. Swan*, 7 Mass. 291; *Hill v. West*, 8

Ohio, 225; *Massie v. Sebastian*, 4 Bibb, 436; *Nash v. Spofford*, 10 Met. 192. And see 4 Com. Dig. 79 b.

⁵ *Yourse v. Norcross*, 12 Mo. 549. And see *Porch v. Fries*, 3 C. E. Green, 204; *Dodd v. Benthall*, 4 Heisk. 601; *Williams v. Baker*, 71 Penn. St. 476.

⁶ *Dixon v. Merrett*, 21 Minn. 196.

⁷ *Schmitheimer v. Eiseman*, 7 Bush, 298. *Sed qu.*, where the land belongs to the wife's general, and not her separate estate. *Sims v. Everhardt*, 102 U. S. Supr. 300, commenting upon *Scranton v. Stewart*, 52 Ind. 68.

⁸ *Sims v. Everhardt*, 102 U. S. Supr. 300. And see *Harrer v. Wallner*, 80 Ill. 197.

§ 179. **Estoppel as applied to the Wife's Statutory Conveyance; General Lands and Separate Lands distinguished.**—We may observe, on the whole, that, while modern statutes greatly vary in this country, as to the requisites attending a married woman's conveyance of her lands, and, as we shall notice hereafter, concerning her legal dominion over her lands, the disposition is to construe those requisites more strictly in the case of her general or common-law real estate than where she owns land as her statutory separate estate. Hence a distinction, which modern legislation tends all the while to obliterate, between the conveyance of the wife's general land and of her separate land. As to the latter, estoppel *in pais* is sometimes applicable; but not so, usually, with the former. In the one case the wife's own conduct during coverture, by way of affirmance or receiving benefits, may bind her in spite of some defective method of conveyance; in the other and present case it does not.¹

§ 180. **Wife's Execution where Husband's Lands and her own are conveyed together.**—Usually a conveyance of land owned by the husband in fee should be made separately from that of land owned by the wife in fee. But under the statutes of some States it is held that lands of both descriptions may be embraced in a single conveyance; the wife making but one acknowledgment for the combined purpose of releasing dower in her husband's lands and conveying title in her own.²

§ 181. **Wife's Life Estate; Husband's Interest.**—If the wife at the time of her marriage has a life estate in lands, her husband becomes seised of such estate in the right of his wife, and he is entitled to the profits during coverture. So if it were granted to a trustee for her own use. And the same rule applies whether the estate be for the life of the wife or of some other person. If the estate be for the wife's own life it terminates at her death, and the husband has no further interest in it. But if it be an estate for the life of another person who survives her, the husband takes the

¹ See Real Estate Rights under Part V. *post*; also Wood v. Terry, 30 Ark. 164; Sims v. Everhardt, 102 U. S. Supr. 300, opinion of court.
385; Oglesby Coal Co. v. Pasco, 79 Ill.

² Barker v. Circle, 60 Mo. 258.

profits during the remainder of such person's life as a special occupant of the land. The husband's representatives in either case take crops growing on the land at the time of his death.¹ But the husband might, at common law, take a release or confirmation to enlarge his life estate.² The conveyance of the wife's life estate follows the usual statute rule as to her conveyances.³

As concerns the wife's life estate in her real or personal property, the English chancery courts have followed out exceptions to the doctrines of equitable assignment already noticed, with their limitations.⁴

§ 182. **Wife's Real Estate; Husband's Interest where she is Joint Tenant, &c.** — A husband acquires, by his marriage, the right to use and occupy, during coverture, lands held by his wife in joint tenancy.⁵

§ 183. **Husband's Freehold Interest in Wife's Land not Devisable by Wife.** — The freehold which the husband acquires in his own right in the real estate of his wife during her coverture is a subject upon which the wife's devise cannot operate, more than her conveyance, independently of his permission.⁶

¹ 2 Kent Com. 134; 1 Bright Hus. & Wife, 112, 113.

² Co. Litt. 299.

³ Henning v. Harrison, 13 Bush, 723.

⁴ See Purdew v. Jackson, 1 Russ. 1, and other cases commented upon, *supra*, § 157.

⁵ Bishop v. Blair, 36 Ala. 80; Royston v. Royston, 21 Ga. 161.

⁶ Clarke's Appeal, 79 Penn St. 376.

See *post*, as to the wills of married women.

PART V.

COVERTURE DOCTRINE MODIFIED BY EQUITY AND RECENT STATUTES.

CHAPTER I.

MODERN EQUITY AND LEGISLATIVE CHANGES IN GENERAL.

§ 184. **Prevalent Tendency to equalize the Sexes; Marriage Relation affected.** — Aside from woman's political relations, and those social and business opportunities not peculiar to the marriage state, which are now extended to her sex, we may observe, both in England and the United States, a liberal disposition of court and legislature within the present century to bring her nearer to the plane of manhood, and advance her condition from obedient wife to something like co-equal marriage partner. Man makes the concessions, step by step, out of deference to woman's wishes, and in token of her influence; and thus does the coverture theory of marriage gradually fade out of our jurisprudence. The liberal tendencies of modern civilization favor this change: moreover, that love of justice and individual liberty which always characterized our Saxon race, and the steadfast disposition of English and American courts both to administer the written law impartially and to extend and adapt its provisions to the ever-changing wants of society.

§ 185. **Wife's Consideration Promoted; Idea of Domestic Government Weakened.** — Our preceding pages have shown, in respect to the person of the spouses, their matrimonial domicile, the conjugal restraint and correction of the wife,

the custody of the offspring; again, as to the wife's power to bind as agent, her necessities, or, in respect of property, her equity to a settlement, and modern modes of conveying her lands; a modern disposition to so construe and apply or modify the old law that she may enjoy a very fair share of freedom and consideration in the household, and maintain her dignity under all circumstances. Husband and wife cease to be one; they are two distinct persons with distinct and independent rights. At the same time the idea of unity in the domestic government — of domestic government at all — becomes weakened; the cruel or dissolute husband having less power for ill, and the just and faithful one, too, finding his legal authority over a high-tempered companion exceedingly precarious. Modern legislation accomplishes even more than judicial construction towards this result, especially in the United States; and indeed, as to the married women's acts and divorce acts of this day, it may be truly said that England borrows more from this country than does this country from England.

§ 186. **The American Married Women's Acts; their Scope and Present Defects.** — Of the American married women's acts, which relate chiefly to their property and contracts, we have already spoken.¹ These acts are modern; still, they are constantly undergoing local change, and immense labor has been necessarily bestowed by local courts during the last fifteen years in expounding them. We shall seek to place before the reader such legal results as may be thought to have passed into principles; as for the rest, it is a chaos of uninteresting rubbish, from which the practitioner selects only that which obtains in his own jurisdiction.

All this legislation regarding the rights of married women should be harmonized and simplified as soon as practicable. This is not easy with so many independent States, each carving out its own career. And the difficulty is aggravated from the fact that the married women's acts had no common origin; there was no model found to work from, English or American, and the results were necessarily discordant. Yet

¹ See Part I., *supra*.

should public sentiment once set in the right direction, much might be accomplished at no distant day. If, too, the married women's codes of this country are to serve as a guide to other nations, they should bear the impress of a clear and well-defined purpose. Either the ultimate object should be to place the wife on an independent footing, and enable her to maintain herself against the world, or else, providing honorably, faithfully, and generously against all possible misfortune, to teach her still to lean upon the stronger arm of her husband, and look to man for guidance. But our legislators sometimes appear to attempt both systems together. Laws which invite married women to embark in separate trade tend plainly to the wife's independence. Laws, on the other hand, which class widows and orphans together as subjects for special protection, preserve homestead exemptions, permit of settlements against the husband's creditors, are founded on the policy of the wife's dependence. It is not to be presumed that frank and straightforward discussion is inappropriate to any topic where radical changes are demanded; nor can the fundamental relation of the sexes and the balance of society be lightly disturbed. Equality and freedom are precious words; but if the respective spheres of man and woman are equally honorable, equally useful, equally free, need they be precisely identical? Does not inequality manifest itself when the two seek to run the same circuit? As a logical proposition, if woman in her pursuits has the right to become a man, man has no less the right to become a woman. Whether the change would be expedient and wise, however, is another question. Certain it is that woman cannot claim the privileges of the two sexes; if she would grasp at civil honors, she must surrender her time-honored tribute of chivalrous homage. Elevated to the pedestal of honor, and made the object of reverent esteem, if not idolatry, the wife stands perhaps as securely as she ever can upon the prosaic ground of legal equality.

§ 187. **Modifications introduced by Equity and these Statutes; Separate Property.** — The changes to which we shall proceed to direct the reader's inquiry, under our main heading, must be studied as by way of supplement or supersedure to

the coverture doctrine set forth in the Part preceding. As before, these changes affect the wife's debts and contracts, her injuries and frauds, and her personal and real property. They are partly of equitable and partly of statutory origin. But, most of all, they impair the old doctrine which treated the husband as absolute or temporary owner, controller, and manager of his wife's property and acquisitions, by virtue of the marriage, and create in favor of the wife what is commonly known in these days as her separate property.

§ 188. **How the Law at the Present Day should be ascertained.** — Here, therefore, as on most points relating to the law of husband and wife, one must first examine the old common-law or coverture doctrine, and then perceive how far modern equity rules or the local legislation may have varied that law. Such changes date back not much farther than a century, the most radical of them being less than half a century old; the equitable changes being for the most part of earlier, and the statutory changes of later date, and the law of England and this country harmonizing on the whole subject, at the independence of the American colonies, as at their first settlement. The instances will be found rare at the present day, where an important common-law principle respecting the wife's contracts, torts, property, and the formalities of suit, is not at this day essentially changed.

CHAPTER II.

THE WIFE'S SEPARATE PROPERTY; ENGLISH DOCTRINE.

§ 189. **Equitable Separate Estate and Statutory Separate Estate in General.** — As preliminary to an exposition of the wife's separate property, we may observe that there is an equitable doctrine on this subject and a statutory doctrine. The equitable doctrine is the prior in point of time, and is chiefly the work of English chancery courts; while the statutory doctrine, which is of later date, is founded in the married women's

acts, now familiar in our several States, and their judicial construction. The equitable doctrine is more purely English; the statutory doctrine more purely American, — though each country has come, ere this day, to borrow in this respect from the other. American cases frequently distinguish still between an equitable separate estate and a statutory separate estate in favor of a wife; but so sweeping is the latest legislation in most States that such a distinction becomes of comparatively little consequence.

In the present chapter, and with reference to Great Britain, our concern is almost exclusively with the remarkable development of an equitable doctrine of separate property.

§ 190. *Origin and Nature of Separate Estate in the English Chancery.* — Emerging from coverture and the common law, we come out into the light of equity; and here all things assume a new aspect. The married woman is no longer buried under legal fictions. She ceases to hold the strange position of a being without an existence, one whose identity is suspended or sunk in the *status* of her husband; she becomes a distinct person, with her own property rights and liabilities. Her condition is not as independent as before marriage; this the very idea of the marriage relation and the disabilities of her sex forbid. But she is dependent only so far as the laws of nature and the forms of society make her so; while her comparative feebleness renders her the special object of chancery protection, whenever the interests of herself and her husband clash together. She may contract on her own behalf; she may sue and be sued in her own name; she may hold lands, goods, and chattels in her own right, which property is known as the wife's separate estate, or estate limited to the wife's separate use.

The doctrine of the wife's separate estate originated in the spreading conviction that it was expedient for the interests of society that means should exist by which, upon marriage, either the parties themselves by contract, or those who intended to give bounty to a family, might secure property without that property being subject to the control of the husband.¹

¹ *Bennie v. Ritchie*, 12 Cl. & Fin. 284; *Peachey Mar. Settl.* 259.

In England that doctrine was established more than a century ago, and to the equity courts belong the credit of the invention.¹ The equity to a settlement, which we have fully discussed, is part of that doctrine.² While at common law the separate existence of the wife was neither known nor contemplated, equity considered that a married woman was capable of possessing property to her own use, independently of her husband; and the courts gradually widened and developed this principle until it became fully settled that, however the wife's property might be acquired, whether through contract with her husband before marriage, or by gift from him or from any stranger independently of such contract, equity would protect it, if duly set apart as her separate estate, no matter though the husband himself must be held as the trustee to support it.³

This great change in the jurisprudence of England was effected by a few great men without any help from the legislature. The court of chancery in this as in other respects recognized its true function of making the law work justice by accommodating its operation to the altered circumstances of society.⁴ Obscure and doubtful indications of the wife's separate estate are found as early as the reign of Queen Elizabeth. It seems to have been plainly recognized by Lord Nottingham, Lord Somers, and Lord Cowper. In Lord Hardwicke's time it was perfectly established; and Lord Thurlow, in sanctioning the clause against anticipation, prevented the wife herself from destroying the fabric which had been reared for her benefit.⁵

§ 191. **Whether Appointment of a Trustee is Necessary or Proper.** — Where property comes to the wife's separate use, it is treated in equity as trust estate, of which she is *cestui que trust*. Yet it is not actually necessary that the instrument constituting the separate use should itself make an appointment of trustees. Formerly the rule was otherwise; but at

¹ *Harvey v. Harvey*, 1 P. Wms. 124;
Woodmeston v. Walker, 2 R. & M. 205;
Tullett v. Armstrong, 1 Beav. 21.

² *Supra*, §§ 160-162.

³ *Tullett v. Armstrong*, 1 Beav. 21;
Peachey Mar. Settl. 260, and cases cited.

⁴ *Macq. Hus. & Wife*, 284.

⁵ See *Pybus v. Smith*, 4 Bro. C. C. 485; *Tullett v. Armstrong*, per Lord Langdale, 1 Beav. 22; *Macq. Hus. & Wife*, 285.

the present day equity makes the husband a trustee where no other holds possession, and thus supports the trust.¹ And where a trustee, regularly appointed, in breach of his duty, and without the privity of the wife, pays the trust-money over to the husband, equity follows the money into the husband's hands, and makes him likewise accountable as his wife's trustee.² It impresses a trust upon the wife's separate estate wherever such estate may be found. But while the appointment of third persons as trustees is not essential to give the wife a separate estate, or a separate interest in any particular estate, it is certainly desirable on many accounts, and there is in it this marked advantage, that the property is made thereby more secure, because such influence of the husband over the wife is prevented as might induce her to abandon the property to him.³

§ 192. **What Words and Acts suffice to create the Separate Use.** — *Prima facie* the legal ownership of property which is in his wife at the time of marriage, or comes to her during coverture, vests in the husband under his marital right. It is therefore necessary that the intention to establish a separate use be clearly manifested, else courts of equity will not interpose against him. No technical formalities or expressions are required; but the purpose must appear beyond the reach of reasonable controversy, in order to entitle the wife to claim the property as her own in derogation of the common law.⁴

As to the words which in themselves indicate the intention of creating a separate use, there have been numerous decisions. Among them the following expressions are held sufficient: "For her full and sole use and benefit."⁵ "For

¹ *Bennett v. Davis*, 2 P. Wms. 316; *Davison v. Atkinson*, 5 T. R. 435; *Messenger v. Clarke*, 5 Exch. 893; *Peachey Mar. Settl.* 290; *Fox v. Hawks*, L. R. 18 Ch. D. 822.

² *Rich v. Cockell*, 9 Ves. 375. See also *Izod v. Lamb*, 1 Cr. & J. 35.

³ *Newlands v. Paynter*, 10 Sim. 377; s. c. on appeal, 4 M. & Cr. 408; *Humphrey v. Richards*, 25 L. J. Eq. 444; s. c. 2 Jur. 488; *Peachey Mar. Settl.* 290; *Macq. Hus. & Wife*, 291. Equity

can sanction, on behalf of a married woman, the compromise of a suit to make a trustee liable for breach of trust in the fund. *Wall v. Rogers*, L. R. 9 Eq. 58.

⁴ *Macq. Hus. & Wife*, 307; *Tyler v. Lake*, 2 Russ. & M. 183; *Kensington v. Dollond*, 2 M. & K. 184; *Moore v. Morris*, 4 Drew. 87; *Peachey Mar. Settl.* 279.

⁵ *Arthur v. Arthur*, 11 Ir. Eq. 511.

her own sole use and benefit."¹ "For her sole use."² "For her sole and separate use and benefit."³ "For her sole and separate use."⁴ "For her sole use and benefit."⁵ "For her own sole use, benefit, and disposition."⁶ "For her sole and absolute use."⁷ "For her own use, and at her own disposal."⁸ "To be at her disposal, and to do therewith as she shall think fit."⁹ "Solely and entirely for her own use and benefit."¹⁰ "For her own use, independent of any husband."¹¹ "Not subjected to the control of her husband."¹² "For her own use and benefit, independent of any other person."¹³ "For her livelihood."¹⁴ "As her separate estate."¹⁵ "To receive the rents while she lives, whether married or single."¹⁶

So, too, the intention of excluding the husband's marital rights may be inferred from the nature of the provisions attached to the gift; as where, for example, the direction is that the property shall be at the wife's disposal, or there is some other clear indication that such was the donor's intention.¹⁷ Lord Thurlow once decided that a direction "that the interest and profits be paid to her, and the principal to her or to her order by note, or writing under her hand," created a trust for the wife's separate use.¹⁸ So in the judgment of Sir William Fortescue, Master of the Rolls, did the words "that she should enjoy and receive the issues and profits of the estate."¹⁹ And Lord Loughborough gave a like effect to a direction that certain property should be delivered up to a married woman "whenever she should demand or require the same."²⁰ A similar construction has also been

¹ *Ex parte Killick*, 3 Mon. D. & De G. 480.

² *Lindsell v. Thacker*, 12 Sim. 178.

³ *Archer v. Rorke*, 7 Ir. Eq. 478.

⁴ *Parker v. Brooke*, 9 Ves. 533; *Adams v. Armitage*, 19 Ves. 415.

⁵ — *v. Lyne, Younge*, 562.

⁶ *Ex parte Ray*, 1 Mudd. 190.

⁷ *Davis v. Prout*, 7 Beav. 288.

⁸ *Prichard v. Ames, Turn. & Russ.* 222.

⁹ *Kirk v. Paulin*, 9 Vin. Abr. 96, pl. 43.

¹⁰ *Inglefield v. Coghlan*, 2 Coll. 247.

¹¹ *Wagstaff v. Smith*, 9 Ves. 520.

¹² *Bain v. Lescher*, 11 Sim. 397.

¹³ *Margetts v. Barringer*, 7 Sim. 482.

¹⁴ *Darley v. Darley*, 8 Atk. 399. And see *Peachey Mar. Settl.* 279, 280;

Macq. Hus. & Wife, 308, 309.

¹⁵ *Fox v. Hawks*, L. R. 13 Ch. D. 822.

¹⁶ *Goulder v. Camm, De G. F. & J.* 146.

¹⁷ *Prichard v. Ames, Turn. & Russ.* 223; *Peachey Mar. Settl.* 279.

¹⁸ *Hulme v. Tenant*, 1 Bro. C. C. 16.

¹⁹ *Tyrrell v. Hope*, 2 Atk. 561. "For to what end should she receive it," says this judge, "if it is the property of the husband the next moment?"

²⁰ *Dixon v. Olmibus*, 2 Cox, 414.

applied to the words, "to be laid out in what she (the wife) shall think fit."¹ And a legacy to a married woman, "her receipt to be a sufficient discharge to the executors," has been held sufficient.² A legacy added by a codicil to the legacy given by a will is subject to the incidents of the original legacy; and the separate use may be extended by construction from the will to the codicil.³

§ 193. **What Words and Acts suffice to create the Separate Use; Subject continued.** — Yet, on the other hand, the form of expression will go far towards determining whether property is or is not limited to the wife's separate use. Vice-Chancellor Wigram, in a case before him not many years ago, was forced to admit that while ruling out certain property from the wife's separate use, on account of the testator's insufficient language, he had a strong opinion that he decided against the real intention of the testator.⁴ It is to be observed, then, that courts of equity will not deprive the husband of his rights at law unless the words of themselves leave no doubt of the intention to exclude him.⁵ A mere trust, therefore, to pay the income of a fund to a certain married woman, or to her and her assigns, is not sufficient to prevent the marital rights from attaching.⁶ Nor is a devise to a certain widow's sole use and benefit without reference to a future husband.⁷ Even a gift to a wife "for her use" has been held not a sufficiently unequivocal declaration of an intention to create a trust for the separate use of the wife.⁸ Some words have greater efficacy than others. Thus it has been said that the word "enjoy" is very strong to imply a separate use.⁹ And much controversy has arisen in the English chancery courts over the use of the word "own" as synonymous with "sole," the result of which is to estab-

¹ *Atcherley v. Vernon*, 10 Mod. 518.
See *Blacklow v. Laws*, 2 Hare, 52.

² *Warwick v. Hawkins*, 13 E. L. & Eq. 174.

³ *Day v. Croft*, 4 Beav. 561.

⁴ *Blacklow v. Laws*, 2 Hare, 49.

⁵ *Peachey Mar. Settl.* 281; *Tyler v. Lake*, 2 Russ. & M. 188; *Massey v. Parker*, 2 M. & K. 181; *Macq. Hus. & Wife*, 309.

⁶ *Lumb v. Milnes*, 5 Ves. 517; *Brown v. Clark*, 3 Ves. 166; *Spirett v. Willows*, 11 Jur. n. s. 70.

⁷ *Gilbert v. Lewis*, 1 De G. J. & M. 38.

⁸ *Jacobs v. Amyatt*, 1 Madd. 376, n.; *Wills v. Sayers*, 4 Madd. 411; *Roberts v. Spicer*, 5 Madd. 491.

⁹ Sir William Fortescue, in *Tyrell v. Hope*, 2 Atk. 558.

lish that there is a substantial distinction between a gift to a wife "for her sole use" and a gift "for her own use," or "for her own use and benefit."¹ And it having been decided that the word "own" had no exclusive meaning, it was next determined that a trust to pay the proceeds of real estate into the proper hands of a married woman for her own use and benefit was not a gift to the wife's separate use, the word "proper" being the Latin form of the word "own," and therefore payment into the wife's proper hands signifying the same thing as into her own hands.² Lord Brougham thus in effect overruled a decision of Lord Alvanley, who had held that the use of the word "proper" would create a separate use.³ This later construction, coming from a jurisdiction so conclusive, has since prevailed, though not without some expressions of dissatisfaction in the lower courts.⁴ And again, language of the donor, expressive of his intent to limit property to the wife's separate use, may be controlled by other words or provisions so as to negative such a supposition. This principle was applied to the wife's disadvantage in a case where others were made the objects of the bounty with her.⁵ Yet it has been held that a gift to the wife's separate use was good, although the support and education of children was annexed as a charge upon it.⁶ The expression "her intended husband" may apply to a second husband, where there are words limiting income to the wife's separate use during her life, for this latter expression controls the former.⁷

Whether the word "sole" is of itself sufficient to create a separate use is doubtful. Different opinions have been expressed on this point. But in a recent case before Vice-Chancellor Kindersley the word "sole" was deemed insufficient, in a devise of property to a female, her heirs, executors,

¹ See Lord Brougham's judgment in *Tyler v. Lake*, 2 Russ. & M. 187; *Johnes v. Lockhart*, 3 Bro. C. C. 388, n.; *Peachey Mar. Settl.* 282.

² *Tyler v. Lake*, 2 Russ. & M. 187.

³ *Hartley v. Hurle*, 5 Ves. 545.

⁴ See Vice-Chancellor Wigram, in *Blacklow v. Laws*, 2 Hare, 49; *Macq.*

Hus. & Wife, 309; *Peachey Mar. Settl.* 282.

⁵ *Wardle v. Claxton*, 9 Sim. 524. And see *Gilchrist v. Cator*, 1 De G. & S. 188.

⁶ *Cape v. Cape*, 2 You. & Coll. Exch. 543. And see n. to *Macq. Hus. & Wife*, 810.

⁷ *Hawkes v. Hubback*, L. R. 11 Eq. 5.

administrators, and assigns, "for her and their own sole and absolute use and benefit," to create a separate estate; since the word "sole," as here used, had reference not only to the female herself, but to her heirs, executors, administrators, and assigns, who certainly could not be considered beneficiaries under any such trust.¹

§ 194. **Admission of a Separate Estate by form of Suit.** — As a wife is only made a party to a suit instituted by her husband on the alleged ground of her having separate estate, in regard to which she is a *feme sole*, the husband, by making her a party, admits it to be her separate estate.²

§ 195. **Separate Use binds Produce of the Fund.** — A gift of the produce of a fund is to be considered a gift of that produce in perpetuity; hence, it is a gift of the fund itself, nothing appearing to show a different intention. Therefore a bequest of a fund to a woman, with the interest thereon, to be vested in trustees, — the income arising therefrom to be for her separate use and benefit, — vests the capital for her separate use.³ Where a testator simply directs the investment of a fund in trustees, for the benefit of a married woman, independent of the control of her husband, this is enough to carry the whole fund to her separate use.⁴ So it is held that where stock was given to trustees upon trust, to pay the dividends to a married woman for her separate use, and there was no limitation of a life interest, an absolute interest in the capital passed to her, which she could dispose of as a *feme sole*.⁵

It is fair to suppose that in equity the wife's separate use binds the produce of the fund as well as the fund itself. There are some cases decided in the courts of common law where the contrary has been maintained, and to this effect, that, although a wife may be entitled to separate property,

¹ *Lewis v. Mathews*, L. R. 2 Eq. 177. And see *Troutbeck v. Boughey*, L. R. 2 Eq. 534. See also, as to property to husband and another in trust, *Ex parte Beilby*, 1 Glyn & Jam. 167; *n. to Peachey Mar. Settl.* 283.

² *Earl v. Ferris*, 19 Beav. 69.

³ *Adamson v. Armitage*, 19 Ves. 416; *Macq. Hus. & Wife*, 311; *Troutbeck v. Boughey*, L. R. 2 Eq. 534.

⁴ *Simons v. Howard*, 1 Keen, 7, per Lord Langdale.

⁵ *Elton v. Shephard*, 1 Bro. C. C. 532; *Haig v. Swiney*, 1 Sim. & Stu. 487.

the dividends arising therefrom vest in her husband.¹ This is no reason, however, why the equity doctrine should not be as we have stated; indeed, if it were otherwise, as an English writer has observed, the object of separate use would be in many instances frustrated.² What the wife saves out of her separate income, too, if its identity be properly preserved, is in equity her separate estate.³ It must only be observed that income or produce of the fund, if once in the husband's hands, may readily be presumed to have been bestowed upon him by the wife either for himself or the family expenses.

§ 196. *Separate Use continues only during the Marriage State; Husband's Rights on Wife's Decease.* — The quality of separate estate ceases on the death of the wife; and if her husband survives her, he becomes entitled to the property as though it had never been settled to her separate use. For the separate use was created only for the marriage state, and was not designed to extend beyond the dissolution of marriage, or when the necessity of the trust should be no longer felt. Thus *choses in possession* settled to the wife's separate use vest in the husband absolutely upon his survivorship.⁴ The wife's separate *choses in action* may be recovered by him in his right as her administrator.⁵ So, doubtless, her separate chattels real go to the husband as survivor. In short, the wife's separate property, upon the wife's death, is freed from its peculiar incidents, and becomes like any other estate of hers which may remain at her decease.⁶ And it seems clear that the husband may be tenant by the curtesy, as usual, if not expressly excluded from all marital interest.⁷

¹ *Tugman v. Hopkins*, 4 Man. & Gr. 389; *Carne v. Brice*, 7 M. & W. 183. 110; *Brooke v. Brooke*, 4 Jur. n. s. 472.

² See Macq. Hus. & Wife, 291, and n.

And see *dictum* of Sir Lancelot Shadwell, in *Molony v. Kennedy*, 10 Sim. 254 (quoted *ib.*), which intimates that this is the equity doctrine; per Lord Hardwicke, *Churchill v. Dibbin*, 9 Sim. 447, n. *Contra*, *Peachey Mar. Settl.* 268, where cases are cited which do not support the statement in the text.

³ *Barrack v. McCulloch*, 3 Kay & J.

⁴ *Molony v. Kennedy*, 10 Sim. 254.

⁵ *Proudley v. Fielder*, 2 Myl. & K. 57; *Drury v. Scott*, 4 You. & Coll. Ch. 284; *Stead v. Clay*, 1 Sim. 294.

⁶ Macq. Hus. & Wife, 285; *Peachey Mar. Settl.* 278; *Sloper v. Cottrell*, 6 El. & Bl. 501; *Bird v. Pegrum*, 13 C. B. 660; s. c. 17 Jur. 579.

⁷ *Lushington v. Sewell*, 1 Sim. 548; *Roberts v. Dixwell*, 1 Atk. 606, per Lord Hardwicke; Macq. Hus. & Wife, 287;

Yet the wife may defeat her husband's claim after her death by exercising her power of disposition during her lifetime, — a power which is recognized in a married woman so far as her separate property is concerned.¹ So, too, by the terms of the trust, the husband's rights on her decease may be prevented from attaching. Thus, where a wife entitled to separate property for life, under a settlement which directed that all the trust property and all the income thereof "remaining unapplied" at her death should go in a certain manner, left her husband some years before her death; and the trustees received the income regularly, and paid it into a bank in their own names, with her privity, making remittances to her as she required money; and upon the wife's death the sum of £888 was found among her effects, and a balance of £2,049 accumulated income stood to the credit of the trustees in the bank; it was held by the Vice-Chancellor of England that the former went to the surviving husband by virtue of his marital right, while the latter was bound by the trusts of the deed as the result of income "remaining unapplied" at her death.²

§ 197. **Separate Use may be Ambulatory; Case of Marriage; Widowhood; Remarriage.** — Since the separate use can exist only in the marriage state, it may sometimes have an ambulatory operation, so as to be effectual according as the woman happens at the time to be covert or sole. Supposing, then, a gift be made to the separate use of a woman who is single at the time the gift takes effect, it is clear that she shall enjoy the gift absolutely and without restraint. But if she afterwards marries, will the separate use operate? It will, unless by the terms of her marriage settlement she expressly renounces it.³ Supposing, however, she outlives her husband, the separate use ceases as in other cases, since it can only be effectual during coverture. But if she marries again, the separate use, consistently with its intention, revives once more,

Appleton v. Rowley, L. R. 8 Eq. 189;
Cooper v. Macdonald, L. R. 7 Ch. D.
288. Otherwise, where by the terms of
the separate use the husband is ex-
cluded from curtesy. Moore v. Web-
ster, L. R. 8 Eq. 267.

¹ Macq. Hus. & Wife, 235. This
will presently be considered further.

² Johnstone v. Lumb, 15 Sim. 306.

³ Tullett v. Armstrong, 1 Beav. 1;
Anderson v. Anderson, 2 Myl. & K.
427; Macq. Hus. & Wife, 305.

and so onward, from time to time, ceasing and reviving alternately, upon each alteration of her personal condition,¹ with, however, this reservation, that if confined by intendment to a particular husband or a particular coverture, the separate use ceases to operate when that marriage ends.²

§ 198. **Wife's Power to renounce Separate Use.** — A single woman, having a gift expressed to be to her separate use, may renounce such separate use upon her marriage. This will be readily admitted. Yet the courts construe an act of this sort strictly.³ The evidence must be clear in all cases, that a single woman marrying has renounced her separate use; for it will not be presumed that she means, by the mere fact of matrimony, to relinquish her control of the property. But antenuptial settlements may be made on reasonable terms by the parties contemplating marriage. And there is nothing to prevent the operation of a trust for separate use from being confined to a particular coverture, where all concerned are so minded. In such cases, however, the wife marrying again can always stipulate for her separate use.⁴

§ 199. **Whether Wife's Separate Use affects the Husband's Marital Obligations.** — It would appear to be the English doctrine that the marital obligations of the husband are not essentially altered by her right to separate property. Thus, it is held that the wife is not bound to maintain her husband out of her separate fortune, nor to bring any part of it into contribution for family purposes.⁵ And there seems to be no legal authority to support the notion that the husband's liabilities on her general debts are thereby altered during their joint lives.⁶ The common-law liabilities of the husband, to be sure, rest in great measure upon his right to his wife's property; yet we may admit that it would be difficult to

¹ Macq. Hus. & Wife, 306; Tullett v. Armstrong, 1 Beav. 1, affirmed by Lord Cottenham, 4 Myl. & Cr. 377; Hawkes v. Hubback, L. R. 11 Eq. 5.

² 2 Perry Trusts, §§ 652, 653, and cases cited; Benson v. Benson, 6 Sim. 26; 1 Ch. Ca. 307; 1 Vern. 7; Moore v. Harris, 4 Dr. 38.

³ Johnson v. Johnson, 1 Keen, 648; Macq. Hus. & Wife, 306.

⁴ Macq. Hus. & Wife, 307. See Knight v. Knight, 6 Sim. 121; Bradley v. Hughes, 8 Sim. 149; Benson v. Benson, 6 Sim. 126.

⁵ Lamb v. Milnes, 5 Ves. 520.

⁶ See Macq. Hus. & Wife, 288. But see *infra*, chapters 3, 4. In *re Baker's* Trusts, L. R. 13 Eq. 168.

adjust any new rule except upon partnership principles. If one marries a rich wife, therefore, who chooses to hoard her savings by herself, bequeath all to others, and compel him, a poor man, to pay for everything she or the children need, all their lives, he assuming her antenuptial debts besides, it is possible that even equity will deny him relief. We here suppose that neither legislation nor the wife's own disposition of her separate property affects the question.

Moreover, the wife is not bound to maintain, educate, or provide for her children out of her separate property; and even though she elope from her husband, equity will not lay hold of her estate for that purpose. This is a settled point in England, unless the legislature shall change the law hereafter; for the House of Lords so decided in *Hodgden v. Hodgden*, on appeal from the lower court of chancery, and under the advice of Lord-Chancellor Cottenham.¹

And yet, whenever a settlement of the wife's equity is decreed, where the husband or his legal representative seeks to recover for himself her *choses in action*, the children of the marriage are included within its benefits; though, to be sure, the wife may waive the claim altogether without reference to them.²

§ 200. *Husband's Disposition of Separate Property to Bona Fide Third Parties without Notice.* — It is possible that a provision for the wife's separate use may fail, as against third parties, *bona fide* purchasers, wherever the husband can dispose of the property without their having notice of the trust.³

§ 201. *Separate Estate as Trust Fund for Wife's Debts.* — The separate estate of a married woman is in suitable instances to be treated as a trust fund for the payment of her separate debts. How far this doctrine should be carried, the authorities are not agreed.⁴ But it rests apparently upon

¹ 4 Cl. & Fin. 823, reversing the decree of the court below.

² See *supra*, §§ 160-162, as to the wife's equity to a settlement.

³ *Parker v. Brooke*, 9 Ves. 588; *Macq. Hus. & Wife*, 291.

⁴ 2 Story Eq. Jur. § 1898, n.; *Norton v. Turvill*, 2 P. Wms. 144. *Vaughan v. Walker*, 8 Ir. Ch. 458, questions this rule, which case in turn is disapproved by *Hodgson v. Williamson*, 42 L. T. 676.

the assumption that, by virtue of her right to dispose of such property (of which we shall speak more at length in another chapter), she has contracted expressly or by implication with reference to her separate estate, the creditor reposing his faith accordingly. And hence it is held that where a stranger advanced moneys for the support of a wife living separate from her husband and in destitute circumstances, her separate estate, after her death, will be bound thereby, and also for her needful burial and funeral expenses.¹

§ 202. **Restraint upon Anticipation.** — The clause of restraint upon anticipation is an important element in the doctrine of the wife's separate use, as administered in England. This clause was sanctioned by Lord Thurlow;² is frequently to be met with in modern conveyances; and is pronounced by Mr. Macqueen, and by eminent English jurists, a salutary clause which takes from the wife the power of bringing ruin upon herself; though it is manifestly in form a fetter upon the trust estate, while the wisdom of its establishment in any case depends upon the folly of the beneficiary.³ With a perfect liberty of disposal, the danger arose that the wife might be persuaded to part with, or charge her separate property, even against her better judgment, through the secret and subtle influences which her husband might bring to bear upon her. But by the clause against anticipation, the wife's hands are tied up; she has not the power of alienating or encumbering the property; and the donor can place his gift beyond the possibility of matrimonial contention. The restraint upon anticipation not only applies to personal property, but extends even to landed property, notwithstanding the common-law methods by which the wife may ordinarily alienate and encumber such estate; so that a person may now devise lands to a married woman in fee-simple in such a manner as to disable her during coverture from making any sale, mortgage, charge, or encumbrance whatever to take

¹ *Hodgson v. Williamson*, 42 L. T. doctrine was afterwards affirmed in 676. *Jackson v. Hobhouse*, 2 Mer. 487, by

² *Miss Watson's Case*. See Pybus Lord Eldon.

v. Smith, 8 Bro. C. C. 340, n. This ³ See Macq. *Hus. & Wife*, 312.

effect against it.¹ It applies equally to estates for life or in fee.²

The name of this important clause originates in the circumstances under which it was first applied.³ The general purport of this expression is that the wife shall be prohibited the anticipation of the income of her separate property or the anticipation of the capital of the fund. Yet the word "anticipation" need not be used in clauses of this sort, nor is any particular form of expression necessary.⁴ This restraint will not prevent a husband from receiving his wife's separate income, nor render his estate liable for more than one year's income, nor, in general, interfere with arrears of income; but it prevents anticipating income on her part, and subjecting to her dominion or her liabilities the capital or income which is not yet payable.⁵

Like the separate use itself, this clause of restraint on anticipation exists only in the marriage state; and property vested in a single woman she may dispose of absolutely, despite such limitation, so long as she remains unmarried; but upon her coverture, while retaining such property, the separate use and the restraint upon anticipation attach and become effective together, cease together upon her widowhood, and revive together upon her remarriage.⁶

But the restraint on anticipation does not exempt a married woman from the ordinary consequences of lapse of time

¹ *Bagget v. Meux*, 1 Phil. 627, per Lord Lyndhurst; 1 Coll. 188; *Macq. Hus. & Wife*, 812; *Peachey Mar. Settl.* 284. Nor can she join her husband in a power of attorney to receive or sue for moneys tied up by this clause. *Kenrick v. Wood*, L. R. 9 Eq. 383.

² *Ib.*

³ See *Pybus v. Smith*, 3 Bro. C. C. 340; *Jodrell v. Jodrell*, 9 Beav. 59.

⁴ Per Lord Cranworth, *In re Ross's Trust*, 1 Sim. 199; *Doolan v. Blake*, 8 Ir. Ch. 349; *Peachey Mar. Settl.* 287. See further, *Moore v. Moore*, 1 Coll. 57; *Tullett v. Armstrong*, 1 Beav. 1; *Macq. Hus. & Wife*, 814, n.; *Steedman v. Poole*, 6 Hare, 193; *Parkes v. White*,

11 Ves. 223; *Clark v. Pister*, 3 Bro. C. C. 346, cited in *Pybus v. Smith*; *Barrymore v. Ellis*, 8 Sim. 1; *Brown v. Bamford*, 1 Phil. 620; *Field v. Evans*, 15 Sim. 375; *Baker v. Bradley*, 2 Jur. n. s. 104; *Peachey Mar. Settl.* 287, 288, and cases cited; *Harrop v. Howard*, 3 Hare, 624; *Harnett v. M'Dougall*, 8 Beav. 187; *Acton v. White*, 1 Sim. & Stu. 429.

⁵ See *Rowley v. Unwin*, 2 K. & J. 138; *Re Brettle*, 2 De G. J. & S. 79; *Lewin Trusts*, 558, 5th ed.

⁶ *Tullett v. Armstrong*, 1 Beav. 1; 4 Myl. & Cr. 377; *Macq. Hus. & Wife*, 818; *Clarke v. Jaques*, 1 Beav. 36; *Dixon v. Dixon*, 1 Beav. 40.

and acquiescence.¹ That fetter upon alienation was imposed for her protection against her husband, but was not intended to exonerate her from the obligation of asserting her claim within a reasonable period. Indeed, it is but reasonable that, as a court of equity creates and models the separate estate, the estate so created and modelled should be subject to the ordinary rules of the court.² But the court cannot mould at will the restraint upon anticipation, though the language used by some of the earlier judges would seem to indicate otherwise; nor get rid of it even where alienation would be advantageous for the married woman; moreover, while the power to impose restraint on anticipation is a mere creature of the court, the restraint itself is always imposed by the author, the settlor of the gift.³

§ 203. *Wife's Separate Use in Common-Law Courts; English Married Women's Acts.* — Although the wife's separate use is the creature of equity, and specially consigned to its watchful keeping, courts of law will sometimes afford it protection. This seems to be, however, only in cases where a trustee is interposed to hold the legal estate; for, since the common-law courts maintain their own maxims, there should be some person designated to hold the fund for the wife; and such person will be considered as the legal owner so as to save the property from attachment and sale for the husband's debts.⁴

Under a recent act of 1870 it is made the duty of a com-

¹ Restraint on anticipation is bad when it tends to a perpetuity. *Buckton v. Hay*, 27 W. R. 527.

² *Derbyshire v. Home*, 3 De G. M. & G. 113.

³ *Robinson v. Wheelwright*, 21 Beav. 220; s. c. on appeal, 6 De G. M. & G. 535; 2 Jur. n. s. 554. See *Peachey Mar. Settl.* 289; *Fitzgibbon v. Blake*, 3 Ir. Ch. 328. Income which a wife is restrained from anticipating will not be applied to make good the consequences of her fraud. *Arnolds v. Woodhams*, L. R. 16 Eq. 29.

A separate trust may be rendered forfeitable on assignment; as, for instance, a wife's pension. *Re Peacock's*

Trusts, L. R. 10 Ch. D. 490. An ingenious attempt was lately made in English chancery to allow a married woman, restrained from anticipation, to anticipate. *Pike v. Fitzgibbon*, L. R. 14 Ch. D. 837. It failed on appeal, and the strict rule was reasserted. s. c. app. 29 W. R. 551. As to whether restraint on anticipation may bar an entail and deprive husband of curtesy, see *Cooper v. Macdonald*, L. R. 7 Ch. D. 288.

⁴ See *Izod v. Lamb*, 1 Cr. & J. 35; *Davison v. Atkinson*, 5 T. R. 434; *Dean v. Brown*, 2 Car. & P. 62; *Macq. Hus. & Wife*, 291.

pany to register stock in the name of a married woman entitled to her separate use; and this duty is enforceable by mandamus.¹ This same statute makes other important changes, with the view of creating a statutory separate estate in married women, which, however, do not as yet attract much judicial comment.²

CHAPTER III.

THE WIFE'S SEPARATE PROPERTY; AMERICAN DOCTRINE.

§ 204. **General Introduction to this Subject.** — The doctrine of the wife's separate estate is one of peculiar growth and development in this country, though doubtless originating in the maxims of the English chancery, and deriving much of its strength from the splendid accomplishments of Langdale, Thurlow, and Eldon, in their own land. What such men and their successors effected by judicial policy we have carried into our statutes; nay, we have gone further. In England the equitable rights of married women are the triumph of the bench; with us the early efforts of the bench have been eclipsed by the later achievements of the legislature, and the judge follows the lawgiver to restrain rather than enlarge. There, in historical sequence, it was proper to study first the equitable doctrine of separate property; here the statutory doctrine may well take precedence.

When this country was first settled, the separate use was

¹ *Queen v. Carnatic R. R. Co.*, L. R. 8 Q. B. 299; Act 33 & 34 Vict. c. 93.

² See Act 33 & 34 Vict. c. 93, (1870). This act declares that wages and earnings of a married woman shall be her separate property; also, her deposits in savings banks (with a proviso); also, upon the observance of certain formalities, her property in the funds, joint-stock companies, &c.; personal property coming to her not exceeding £200; rents and profits of her

freehold property; policies of insurance for benefit of wife (trusts for benefit of wife and children being also permitted).

This moderate act is doubtless the result of influences such as were first manifested in the United States. The American legislation on this subject long antedates the English. Other provisions are found in this act, whose appropriate consideration belongs to a later chapter.

but little understood in England. Its development there was gradual, and its final establishment of a later date. Our ancestors brought over the common law with them; but for equity they had little respect. True, it cannot be said that, by the jurisprudence of a single State, property bestowed upon a married woman to her separate use, free from the control and interference of her husband, would remain subject, notwithstanding, to his marital dominion; but prior to the late married women's acts there were, in many States, no judicial precedents to combat such an assumption. That such trusts might be created was not denied; but whether there were courts with authority to enforce them appeared frequently doubtful.¹ In the New England States scarcely a vestige of the separate use was to be found.² New York, with such eminent chancellors as Kent and Walworth, took the lead in building up an equity system parallel with that of England; and in the reports of this State are to be found most of the leading cases and the ablest discussions of what may be termed American chancery doctrines. New Jersey recognized the separate use, and her chancery court exercised liberal powers. In Pennsylvania the doctrine was recognized to some extent. The courts of Maryland, Virginia, and the Southern States generally, had frequent occasion to apply the separate-use doctrine; none more so than those of North and South Carolina. And it may be remarked that the aristocratic element of society in that section of the country, also a prevalent disposition for family entails, marriage settlements, and fetters upon the transmission of landed property, aided much in developing therein the English chancery sys-

¹ It is true that the general recognition here of the wife's separate use has been presumed by our text-writers. See 2 Kent Com. 162; Reeve Dom. Rel. 162; 2 Story Eq. Juris. § 1378 *et seq.* We confine our observation to judicial precedents. What Chancellor Kent has to say on the American equity doctrines in his work must be taken by the general student with some qualifications, inasmuch as the learned writer draws largely upon his judicial opinions rendered in a State which espe-

cially favored chancery jurisprudence. The want of a general recognition of the wife's separate use, as unfolded in England, aids in explaining the curious fact that our States were legislated into a system which the English chancery had felt competent to rear unaided.

² *Jones v. Ætna Ins. Co.*, 14 Conn. 501, intimated that the married woman could not, in Connecticut, be the independent owner of property. But see *Pinney v. Fellows*, 15 Vt. 525 (1843).

tem. So was it in Kentucky and Tennessee, States founded upon like institutions. But as to Ohio, Indiana, Illinois, and the other States erected from what was formerly known as the Northwest Territory, society was modelled more after New England, and we find no clear recognition of the wife's equitable separate use. Louisiana, and such contiguous States as were originally governed by French and Spanish laws, had more or less of the civil or community system; and to these States English equity maxims had at best only a limited application. Such, then, is the wife's separate use, viewed in the light of judicial precedents, as known in the United States until very nearly the middle of the nineteenth century.¹

But where recognized and enforced at all, the strict American rule was borrowed from that of England, and such, too, has been the later development, as we shall show hereafter.²

§ 205. *The First American Married Women's Acts.* — The wife's separate use, as an American system, or rather as the system of certain American States, had thus progressed when our local legislatures took the whole subject actively in hand. The American equity courts had followed the English precedents pretty closely, but without displaying the same vigor and boldness. None of our reported decisions on the subject of the wife's equitable separate property had attracted popular attention or served to bring out the discussion of strong leading principles, though covering a period of sixty years down to nearly the middle of the present century. During the twenty-five years preceding 1848, a change in public opinion had been gradually wrought in this country and in England, though with us more rapidly than abroad. The married woman of America turned to the legislature rather than the courts of her State for a more complete marital independence, for the right to control her own property, for freedom from

¹ See U. S. Eq. Dig. *Hus. & Wife*, 12; *Reade v. Livingston*, 3 Johns. Ch. 481; *Meth. Ep. Church v. Jaques*, 1 Johns. Ch. 65; *Rogers v. Rogers*, 4 Paige, 516; *Vernon v. Marsh*, 2 Green Ch. 502; *Steel v. Steel*, 1 Ired. Eq. 452; *Jackson v. McAliley*, Speers Eq. 308; *Boykin v. Ciples*, 2 Hill Ch. 200, 204; *Hunt v. Booth*, 1 Freem. Ch. 215; *Warren v. Haley*, 1 S. & M. Ch. 647; *Hamilton v. Bishop*, 8 Yerg. 33; *Griffith v. Griffith*, 5 B. Monr. 113; *McKenna v. Phillips*, 6 Whart. 571; *Gray v. Crook*, 12 Gill & J. 236; *Howard v. Menifee*, 5 Pike, 668.

² See *post*, as to equitable separate property of married women, in this chapter.

the burdens of coverture. In shaping popular sentiment, doubtless, the annexation of territory lately governed by the principles of Roman law had considerable influence, particularly in the States adjacent to Louisiana; still more in a national sense did our rapid advancement as a self-governed nation, and the spread of public education, of independence in life and manners, and of equal social intercourse of the sexes, help on the new reform.

The year 1848 saw a wondrous revolution effected in the foremost States of this Union as to the property rights of married women; and this revolution has since extended to every section of the country. The influence of these changes has also been felt abroad; and a like reform was pressed in the English Parliament about 1870, whose immediate result was the statute to which we have already alluded.¹

§ 206. *The First American Married Women's Acts; Subject continued.* — In 1821 the legislature of Maine had authorized the wife, when deserted by her husband, to sue, make contracts, and convey real estate as if unmarried, prescribing the mode of procedure in such cases. A like law previously existed in Massachusetts.² These appear to have been the earliest of the married women's acts, properly so called: the first-fruits of the modern agitation on woman's rights. The example of Massachusetts and Maine in this respect was soon imitated elsewhere. New Hampshire, Vermont, Tennessee, Kentucky, and Michigan all passed important laws of a similar character before 1850. The independence of married women whose husbands were convicts, runaways, and profligates became thus the first point gained in the new system. In Massachusetts and Rhode Island the wife's separate use in life-insurance contracts for her benefit was an object of special solicitude; then, in 1845, the former State turned its attention further to a public recognition of marriage settlements and trusts for the wife's separate benefit, extending the equity jurisdiction of its courts for that pur-

¹ See 3 Juridical Society Papers (1870), part 17; Act 33 & 34 Vict. c. 93, 1870, under § 203, *supra*.

² See Rev. Sta. Maine (1840), p. 341; Rev. Sta. Mass. (1836), pp. 485, 487.

pose.¹ The right of a married woman to dispose of her property by will was legalized in Illinois, Pennsylvania, Michigan, and Connecticut about the same time. In Connecticut, Ohio, Indiana, and Missouri, the first reforms appear to have been directed towards exempting the wife's property from liability for her husband's debts, rather than giving her a complete dominion over it.²

The Roman principle of an independent estate in the wife, as modified by the more modern French and Spanish community law, prevailed in Louisiana at the time of its admission into the Union; and like traces appear in the legislation of Florida, Arkansas, Texas, and other adjacent States formerly under French and Spanish rule. So was the doctrine of separate estate promulgated by Mississippi statute as early as 1839.³ And in other Southern States, as Alabama and North Carolina, where chancery jurisprudence was well established, appeared laws investing the courts with larger powers in matters of this sort.⁴ Alabama and Mississippi appear to have first postponed the husband's liability for his wife's antenuptial debts to her separate estate.⁵

§ 207. **The New York Married Women's Act of 1848.** — But the sweeping changes effected by the legislature of New York in 1848 deserve more than a passing notice. The debates of the constitutional convention of that State in 1846 evinced the growing desire for a radical reform in the property rights of married women; and the advocates of the movement, failing in their attempt to secure an article of amendment to the State constitution on their behalf, next addressed themselves to the legislature, and with success. On the 7th of April,

¹ A New Hampshire act in 1846 copied these provisions; and a statute of Rhode Island in 1844 made similar enactments. These are indications of what the text has already stated; that trusts for separate use and equity jurisdiction on the wife's behalf were little recognized in that section when the married women's agitation commenced in the United States.

² See 2 Bright *Hus. & Wife*, Am. ed. 1850, p. 627, *et seq.*, where married

women's acts are cited by Mr. Lockwood; 2 Kent Com. 180, n.

³ See 2 Bright, *ib.* The influence of a large commercial city like New Orleans was doubtless felt in the sparsely settled territory surrounding it. The codes of these States were all disfigured by "chattel" provisions, which detracted much from the merits of a policy otherwise humane to the wife.

⁴ 2 Bright, *ib.*

⁵ *ib.* (1846).

1848, was enacted a law "for the more effectual protection of married women," which provided that the real and personal property of any female already married, or who may hereafter marry, which she shall own at the time of marriage, and the rents, issues, and profits thereof, shall not be subject to the disposal of her husband, nor be liable for his debts, and shall continue her sole and separate property as if she were a single female; and that any married female may lawfully receive and hold property in like manner from any person other than her husband, whether by gift, grant, devise, or bequest. This statute, passed at such a time by the foremost State in the Union, — a State thoroughly northern in its institutions, while the recognized champion of chancery principles, — could not fail to make a deep national impression.¹

§ 208. *Other Early Married Women's Acts.* — A parallel movement had meanwhile progressed in Pennsylvania; and in that State an act of the legislature, dated only four days later, conferred substantially the same rights of property upon married women, though expressed in different language. This act, still more remarkable in its general provisions than that of New York, not only recognized the wife's separate use in her own property as a legal right, but at the same time gave her the power to dispose of such estate by will, made it liable for family necessities in failure of attachable property belonging to the husband, admitted children to the inheritance of separate personal estate in common with the surviving husband, and exempted the husband from all liability for his wife's antenuptial debts. It further provided that the wife's separate property should be absolutely liable for her general contracts and torts, and that only her formal consent, given in the manner therein specified, could bring the property under subjection for the husband's debts, or effect a lawful transfer.²

It should be said that both Maine and Michigan had

¹ We give the substance rather than the language of this statute. See 2 Bright *Hus. & Wife*, Am. ed. 1850, Lockwood's note, 581 *et seq.* This statute was afterwards considerably modified by Acts of 1849, c. 375, and 1860, c. 90, § 1.

² Bright, *ib.*, p. 648; *Laws Penn.* 1848, pp. 536, 537, 538.

enacted laws in 1844, giving enlarged powers to the wife to hold and dispose of separate property; thus anticipating some of the statutory changes both in New York and Pennsylvania.¹

§ 209. **Married Women's Acts in America; Revolution in Marital Rights.** — From this time forth the revolution became rapid, and has since extended to all the States, Virginia being the last to yield. And the work of legislative change still goes on. Scarcely a year passed between 1850 and 1870 without some new married women's acts added to the local statute books;² and with regard to woman in general, the constant tendency has been to enlarge her freedom of action, and open to her sex pursuits hitherto closed against it.

§ 210. **Scope of Married Women's Acts to extend rather than limit.** — The main principles touching the acquisition of a statutory separate property by the wife, as an American system of positive law, we shall now consider as fairly as cir-

¹ Rev. Stat. Mich. (1846) p. 340; Maine Statutes, March 22, 1844.

² The acts now in force, many of them perplexing, which need not here be detailed, will be found summarized up to the date of 1878 in Wells's *Separate Property of Married Women*, Part I. More or less liberality is shown in different States in the legislative grant of separate property, but the tendency on the whole is to place the married woman on the footing of a *feme sole* in respect of property and kindred rights of suit and contract.

In the *Southern Law Review*, vol. 6, p. 688, will be found an instructive article by Professor Henry Hitchcock, commenting upon marital property rights as defined by American statutes in force in 1880. Detailing the statutory changes which have occurred, the author calls attention to the fact that in Connecticut, beginning with the act of 1845, there were eleven successive statutes passed at intervals during the twenty-one years ending in 1866. And see *Jackson v. Hubbard*, 36 Conn. 10, on this point. Afterward another statute was passed in this State in 1869, and still another in 1872, and then at

the general revision of the statutes in 1876 a further amendment took place. This is a marked, but not exceptional, instance of State innovations in the law of Husband and Wife. Between 1850 and 1860 inclusive, notes the writer, the following States began their married women's legislation, some boldly, others timidly: Indiana, Missouri, New Jersey, Kansas; Ohio, and Illinois followed in 1861, and other States successively in subsequent years. In 1869 Congress enacted, for the benefit of married women in the District of Columbia, one of the most radical laws on the subject. The last State to fall into line was Virginia, in 1877.

To attempt a useful digest or summary of laws so incongruous, so purely local in application, and so constantly changing, is at this day useless. In Schouler's *Domestic Relations*, p. 211, note, 1st edition, an attempt was made to do so in 1870, but ten years of additional legislation in almost every State renders that summary utterly valueless. An examination of decided cases in the course of successive chapters may supply the reader with a fair substitute.

cumstances permit. And, first, it may be remarked in general that these American married women's acts are designed for woman's benefit, and that they do not limit, but rather extend, her right to beneficially hold separate property. Thus it is held that the wife's equity to a settlement from her *choses in action* remains as before; for the legislature intended to offer her what was supposed to be a more valuable right, leaving it to her election to claim the benefit of the act or to assert her equity to a settlement without regard to its provisions.¹

Where she is held to be restricted by the statute at all, it is generally with reference to the right of disposition, and in order that others may not subject it to the fulfilment of her engagements.² We shall presently see, moreover, in the course of our exposition, that the doctrines of an equitable separate estate in the wife are generally invoked at this day as furnishing a system available for her advantage wherever (as rarely happens) the statutory privileges, in any particular instance, prove less adequate for establishing her independent property relations; the main policy of the married women's acts being not to supersede the wife's equitable rights, but to enlarge her legal status, and correct the old anomaly which left her a person in equity but none in law.

§ 211. **Constitutional Points; whether Married Women's Acts operate retrospectively.** — These statutes are not subject to mere technical construction, but the will of the legislature should be fairly interpreted. The legislative will is not presumed to be so exerted as to operate retrospectively. "A retrospective statute, affecting and changing vested rights," observes Chancellor Kent, "is very generally considered in this country as founded on unconstitutional principles, and consequently inoperative and void."³ The whole current of American decisions confirms that statement; and

¹ *Blevins v. Buck*, 26 Ala. 292.

² See *Davis v. Foy*, 7 S. & M. 64; *Pond v. Carpenter*, 12 Minn. 480; *Pippen v. Wesson*, 74 N. C. 487. The subject of the wife's right of disposition is discussed in a later chapter.

³ 1 Kent Com. 455. Various na-

tional and State constitutional provisions — as, *e. g.*, that no one shall be deprived of property "without due process of law," and against impairing the obligation of contracts — have a similar bearing.

thus is it with our married women's acts, for they necessarily reduce the property rights of the husband as prevalent under the common law of coverture. The respective rights of a husband and wife, duly married, in property acquired in any State, before fundamental law or appropriate legislation therein has changed the old rule, must be governed by the rules of the common law.¹ Where a complete legal estate in the wife's lands has already vested in the husband, it is not taken away from him.² The effect of a previous conveyance of land to husband and wife jointly is not changed in respect of survivorship.³ The wife's personal property already in possession or reduced to possession by the husband is his.⁴ And, to go still further, in her *choses in action*, or unreduced personalty which he is already at liberty to reduce, there is a valuable existing interest capable of assignment and transfer, — a vested right in the husband, which a subsequent statute or State constitutional provision cannot deprive him of, according to the better opinion.⁵

¹ Carter v. Carter, 14 S. & M. 59; Eldridge v. Preble, 34 Me. 148; Maynard v. Williams, 17 Ala. 676; Snyder v. Snyder, 3 Barb. 621; Perkins v. Cottrell, 15 Barb. 446; Ratcliffe v. Dougherty, 24 Miss. 181; Jenney v. Gray, 5 Ohio St. 45; Roby v. Boswell, 23 Geo. 51; Burson's Appeal, 22 Penn. St. 164; Tally v. Thompson, 20 Mia. 277; Peck v. Walton, 26 Vt. 82; Tyrson v. Mattair, 8 Fla. 107; Quigley v. Graham, 18 Ohio St. 42; Farrell v. Patterson, 43 Ill. 52; Coombs v. Read, 16 Gray, 271. See Love v. Robertson, 7 Tex. 6. So, rights acquired subsequently under a foreign government. Dubois v. Jackson, 49 Ill. 49.

² Bouknight v. Epting, 11 S. C. 71. And hence the husband's interest therein can be taken and sold on execution. *Ib.*

³ Almond v. Bonnell, 76 Ill. 536.

⁴ Buchanan v. Lee, 69 Ind. 117.

⁵ See Dunn v. Sargent, 101 Mass. 389; Westervelt v. Gregg, 12 N. Y. 202; Ryder v. Hulser, 24 N. Y. 872; Stearns v. Weathers, 80 Ala. 712; Kirksey v. Friend, 48 Ala. 276. Such is

the rule with reference to a legacy bequeathed to a wife, and taking effect before the passage of an act vesting all such property in the married woman: Norris v. Beyea, 13 N. Y. 273, 288; or her distributive share, accruing previously, in an estate: *Ib.*; Kidd v. Montague, 19 Ala. 619; Sperry v. Haslam, 57 Ga. 412; or her stock, mortgages, and incorporeal property generally. See *supra*, § 158.

In Mississippi the rule was laid down differently, upon the fallacious idea that the husband's right to reduce was a mere qualified right upon a condition precedent which the statute might intercept. Clark v. McCreary, 12 S. & M. 347, 354. But to this may be opposed the reasoning of Edwards, J., in Westervelt v. Gregg, *supra*. "A right to reduce a *chose in action* to possession," he observes, "is one thing, and a right to the property which is the result of the process by which the *chose in action* has been reduced to possession is another and a different thing. But they are both equally vested rights. The one is a vested right to obtain the

The interest of a husband in remainder in property already bequeathed to his wife on the contingency of surviving a life-tenant is held to be a vested right in such a sense that it cannot be taken away by a married woman's act passed before the contingency happens.¹ And, in general, an interest vested in the husband, though in a certain sense contingent, which is not a mere expectancy or bare possibility, like that of an heir from his living ancestor who may yet disinherit him by will, but is an interest already created and existing, which is descendible, transmissible, and capable of transfer, is not to be taken away by subsequent legislation in the wife's favor.²

In like manner the husband's vested life estate by way of curtesy initiate in his wife's lands cannot be taken away by legislative enactment, any more than the wife's inchoate right of dower in her husband's lands.³ Nor can any interest which a husband, before the passage of the act, has in his wife's real estate, be thus divested.⁴

§ 212. **Whether Married Women's Acts operate retrospectively; Subject continued.** — In some States all these constitutional perplexities are obviated by legislation which embraces simply such property as may be held or acquired by women marrying after the passage of the act.⁵ But the married women's acts or constitutional amendments usually operate upon parties occupying already the conjugal relation, as the statute language shows, and upon those who as a fact are

thing, with the certainty of obtaining it by resorting to the necessary proceedings, unless there be a legal defence; and the other is a vested right to the thing after it has been obtained." But see *Goodyear v. Rumbaugh*, 18 Penn. St. 480; *Mellinger v. Rausman*, 45 Penn. St. 522; *White v. Waite*, 47 Vt. 502; *Henry v. Dilley*, 1 Dutch. 302, — which favor the Mississippi rule.

¹ *Dunn v. Sargent*, 101 Mass. 836.

² *Gray, J.*, in *Dunn v. Sargent*, 101 Mass. 836; *Shaw, C. J.*, in *Gardner v. Hooper*, 8 Gray, 896.

³ *Rose v. Sanderson*, 38 Ill. 247; *Dayton v. Dusenbury*, 25 N. J. Eq. 110. Rents of the wife's land, too, accruing before her death and prior to the new

constitutional provision as to married women's rights, go with the curtesy, and not to the wife's heirs. *Matthews v. Copeland*, 79 N. C. 493.

⁴ *Burson's Appeal*, 22 Penn. St. 164; *Prall v. Smith*, 31 N. J. L. 244; *Wythe v. Smith*, 4 Sawyer, 17.

The increase of domestic animals purchased by the husband before the passage of the married woman's act, belongs to him, and not to his wife. *Hazebaker v. Goodfellow*, 64 Ill. 238.

⁵ See *Maclay v. Love*, 25 Cal. 367. Such is not the Oregon rule; but women married before the constitutional change are entitled to its benefits. *Rugh v. Ottenheimer*, 6 Oreg. 281.

likely each to have married with some reference to the pecuniary expectations of the other. To protect a husband's interests to any such extent, however, on any constitutional suggestion on his behalf, the courts appear uniformly to decline; for, as it has been observed, the marriage contract does not imply that the husband shall have the same interest in the future acquisitions of the wife that the law gives him in the property she possesses at the time of the marriage, but rather that she shall have whatever interest the legislature, before she is invested with them, may think proper to prescribe.¹

In other words, while the husband's vested rights arising under a marriage cannot be constitutionally disturbed by an alteration of the law, his mere expectancy, or the possibility of some future acquisition by right of marriage, is subject to any change which the legislature may choose to make prior to the vesting of a right in the husband.² And whatever a married woman may have acquired subsequently to the passage of an appropriate act by gift, devise, bequest, and so on, becomes her statutory separate estate, and all parties concerned must govern themselves accordingly.³

§ 218. **Other Constitutional Points relative to the Married Women's Legislation.** — A corresponding rule of constitutional limitations applies to the rights and liabilities of the wife under these acts, as to her title by gift or purchase, and as to her dominion over her property generally,⁴ of which we are to speak hereafter.

In Mississippi it is held that property purchased by the husband, after the passage of the act, with money acquired by the wife by gift or labor before it, even though bought expressly for the wife's benefit and in her name, belongs to the husband.⁵ In Alabama, separate estates created by deed

¹ *Sleight v. Read*, 18 Barb. 159; *Southard v. Plummer*, 36 Me. 64.

² *Cooley Const. Limitations*, 360-362; *Holliday v. McMillan*, 79 N. C. 815; *Gray, J.*, in *Dunn v. Sargent*, 101 Mass. 336; *Hill v. Chambers*, 30 Mich. 422.

³ *Cherokee Lodge v. White*, 68 Ga. 742. A legacy bequeathed to a mar-

ried woman, and taking effect subsequently to the act, ought not to be paid to the husband without her authority. *Nevins v. Gourley*, 95 Ill. 206.

⁴ *Bryant v. Merrill*, 55 Me. 515; *Clark v. Clark*, 20 Ohio St. 128; *Lee v. Lanahan*, 58 Me. 478.

⁵ *Sharp v. Maxwell*, 30 Miss. 442. But on money of the wife, received by

before the statute went into effect remain unaffected thereby, though the marriage took place subsequently.¹ In New York, judgments recovered against a husband prior to the married women's act are not a lien upon the wife's subsequently acquired property.² In Missouri, the act exempting property of the wife from liability for the husband's debts does not affect debts contracted prior to the passage of the act and after the wife came into possession of the property.³ In Ohio it is held that real estate, inherited by a married woman since the enactment making the same her separate property, cannot be charged with a liability incurred by her prior to the passage of the act.⁴

In New York it is held that the legislature may fasten upon the wife's separate bank stock a personal liability to the extent of such stock.⁵ Also that interest, accruing subsequently to the married women's act, on property previously vested in the husband, continues his.⁶ In Illinois it is held that the disabilities of coverture are not so far removed by the separate property act as to take married women out of the saving clause of the statute of limitations.⁷

§ 214. Married Women's Acts as to Ante-nuptial Property and Acquisitions from Third Parties.—Our married women's codes fairly correspond in permitting the wife (subject to constitutional limitations) to hold, in her sole and separate right, all the property, real or personal, which she had at the time of marriage,⁸ or has acquired thereafter from any person other than her husband, by gift, grant, devise, or bequest. Real estate thus held or acquired is regarded, not as land of which the husband enjoys the beneficial use, but as her separate land. Leasehold property may be thus held and enjoyed by the wife. Her personal property, whether in possession

the husband after the act took effect, she is entitled only to the interest accruing the year last preceding the accounting. *Thomson v. Hester*, 55 Miss. 656.

¹ *Willis v. Cadenhead*, 28 Ala. 472. And see *Hardy v. Boaz*, 29 Ala. 168.

² *Sleight v. Read*, 18 Barb. 159.

³ *Cunningham v. Gray*, 20 Mis. 170.

⁴ *Fallis v. Keys*, 85 Ohio St. 265.

⁵ *Matter of Reciprocity Bank*, 29 Barb. 369.

⁶ *Ryder v. Hulse*, 38 Barb. 264; s. c. on appeal, 24 N. Y. 372. See *Savage v. O'Neil*, 42 Barb. 374.

⁷ *Morrison v. Norman*, 47 Ill. 477.

⁸ *Vandevoort v. Gould*, 36 N. Y. 639; *Prevot v. Lawrence*, 51 N. Y. 219.

or lying in action, is her own, provided the statute description be fulfilled. A married woman, transferring stock after marriage from her maiden to her married name, may retain it as her separate property.¹ Notes, bonds, or other evidences of debt, and incorporeal property,² pass to her as well as corporeal property; animate as well as inanimate property;³ money, which of course is personal property.⁴

Land damages under eminent domain proceedings may be her statutory separate property.⁵ And so may the equity obtained by having purchased land, paid part of the purchase-money, and taken a bond for title on payment in full.⁶

§ 215. **Married Women's Acts as to Change of Investment, Increase, and Profits.** — Property acquired by exchange for the wife's statutory property is presumably her separate property likewise, as where one horse is exchanged for another.⁷ And since the income of her separate fund is hers, property purchased with her savings from interest arising out of her separate funds belongs to her as her separate property.⁸ Upon a sale and exchange of the wife's separate, as contrasted with her general, lands, the proceeds belong to the wife.⁹ And where her realty, as in partition proceedings, is converted into money, the proceeds stand in lieu of the real estate for her benefit.¹⁰ Equity comes in aid of these principles, where statutory remedies are inadequate, and indeed of numerous kindred rules under the married women's acts.

The natural increase and profits of the wife's statutory separate property, including the progeny of her separate domestic animals and the rents of her separate lands or the crops, are usually to be construed hers and at her disposal during marriage, as well as the property which produced the increase and profits.¹¹ If it were rightly held otherwise, this would be on

¹ *Mason v. Fuller*, 86 Conn. 160.

² *Selden v. Bank*, 69 Penn. St. 424.

³ *Gans v. Williams*, 62 Ala. 41.

⁴ *Mitchell v. Mitchell*, 35 Miss. 114.

⁵ *Sharpless v. West Chester*, 1 Grant, 257; *State v. Hulick*, 38 N. J. 307.

⁶ *Prout v. Hoge*, 57 Ala. 28.

⁷ *Pike v. Baker*, 53 Ill. 163.

⁸ *Merritt v. Lyon*, 8 Barb. 110.

⁹ *Brevard v. Jones*, 50 Ala. 221.

¹⁰ *Nissley v. Heisey*, 78 Penn. St. 418;

Rice v. Hoffman, 85 Md. 344.

¹¹ *Williams v. McGrade*, 13 Minn.

46; *Hanson v. Millett*, 55 Me. 184;

Gans v. Williams, 62 Ala. 41; *Hutch-*

ins v. Colby, 48 N. H. 159; *Stout v.*

Perry, 70 Ind. 501. But as to products

of the land occupied by the family, *cf.*

Moreland v. Myall, 14 Bush, 474; *Hill*

v. Chambers, 30 Mich. 422.

some construction that the wife had, by her acts and conduct, acquiesced in her husband's assumption of the ownership.¹ In short, all the product and increase of the original property will become the wife's as long as she can follow and identify it,² though expenditure of income for authorized family purposes may well be presumed.³

§ 216. *Method of Transfer from Third Parties under Married Women's Acts, &c.* — Where the property is such as can pass without a written transfer or conveyance, a gift or sale to the wife, of statutory separate property, may be by parol;⁴ although, of course, all proof must consist with the idea that delivery is for her sole and separate use, and not so as to admit the rights of her husband.⁵ Where a conveyance or other written instrument is needful, the expression must likewise conform to the legislative intent; and even where the language of the statute is broad enough to dispense with such phrases as "sole and separate use," the wife's only safety consists in having her name used as that of grantee or transferee, instead of the husband's.⁶ Where it comes to an expression of separate use, under some instrument made on the wife's behalf, an equitable separate use, rather than a statutory separate use, may be said to have been created; though authorities style it under some local acts as a statutory separate estate.⁷

So far is the wife's right to acquire by purchase from third parties favored under our married women's acts, that a conveyance of land for value to a wife has been upheld against her husband's creditors, even though the person who con-

¹ But see peculiar statute construed in *Chambers v. Richardson*, 57 Ala. 85.

² *Holcomb v. Meadville Savings Bank*, 92 Penn. St. 338.

³ See *Chambers v. Richardson*, 57 Ala. 85.

⁴ *Tinsley v. Roll*, 2 Met. (Ky.) 509.

⁵ *Walton v. Broadbush*, 6 Bush, 328.

⁶ *Pepper v. Lee*, 53 Ala. 33; *Slaughter v. Glenn*, 98 U. S. Supr. 242; *Robinson v. O'Neal*, 56 Ala. 541; *Campbell v. Galbreath*, 12 Bush, 459. Under the more sweeping local statutes

a conveyance to a married woman need not state that she is to hold it to her separate use. *Sims v. Rickets*, 35 Ind. 181.

⁷ A conveyance of lands in Alabama to a married woman, "to have and to hold to the sole and proper use, benefit, and behoof of her, her heirs and assigns for ever," vests in her, under the laws of that State, a statutory separate estate. *Lippincott v. Mitchell*, 94 U. S. Supr. 767. And see *Swain v. Duane*, 48 Cal. 358.

veyed it had bought it of her husband, so long as he bought *bona fide* and for valuable consideration.¹

§ 217. **Acquisitions from Husband less favored by Married Women's Acts.** — But as concerns acquisitions of the wife from her husband, the married women's acts by no means concur in making this her statutory separate estate, as they do where the acquisition is derived from some third party. Some local legislatures, to be sure, have gone as far as this, but by no means the greater number.² Hence we may defer the discussion of earnings, pin-money, post-nuptial settlements and gifts from husband to wife until later chapters of this treatise are reached, when the equitable doctrine will be considered in the same connection. A title to separate statutory property cannot be vested in the wife on her husband's credit, where the statute only recognizes her right to acquire from third persons, any more than it could by his money.³ And such is the temptation to making colorable transfers to one's wife in fraud of creditors, that in controversies over title, where the legislation discourages acquisitions from the husband, the wife, as against the husband and his creditors and representatives, has been held quite strictly to her proofs of acquisition from a person other than her husband,⁴ unless, at all events, there are writings which run so as suitably to give her the legal title instead.⁵

Where a husband purchases land or personalty with his own money, and conveys or transfers it to his wife, the question becomes ordinarily one of post-nuptial settlement or gift, with equitable rules such as we shall consider hereafter; though sometimes the married women's act is broad enough in scope to confer the right of separate property acquisition, as such, from a husband, as well as from third persons. If, on either theory, the title vests in the wife, as of her separate right, the proceeds thereof, or the specific re-investment, is the wife's also. Where the husband appropriates such proceeds or takes other property in his own name, equity and

¹ *Evans v. Nealis*, 69 Ind. 148.

⁴ See *Reeves v. Webster*, 71 Ill. 307;

² See *Towle v. Towle*, 114 Mass.

Johnson v. Johnson, 72 Ill. 489.

167; *Jenkins v. Flinn*, 87 Ind. 349.

⁵ *Lyon v. Green Bay R.*, 42 Wis.

Hopkins v. Carey, 23 Miss. 54; 548.

Worth v. York, 18 Ired. 206.

modern statutes between them may preserve the wife's rights; she may, in the usual manner, follow her title into the new property, or else regard her trustee as remiss in duty and indebted to her. But if, at any point of this property management, it be said that the husband appropriated to himself with his wife's assent, then the beneficial, as well as legal, title vests in him. Here, and in laying down the presumption generally as between husband and wife, is a fruitful source of legal embarrassment and uncertainty, as married women's acts stand at the present day. The husband's opportunities are ample; for no third party, as in a trust settlement, stands between these spouses, so closely united, to preserve the property and the evidence of title to the true owner. Nor are States agreed in the course to pursue, since the policy of some is to emancipate woman from property restraints altogether, while others grudge the change as tending to strip husbands of their matrimonial rights; one regards the woman's right to her own acquisitions as properly the rule, another as properly the exception.

§ 218. *Wife's Right to bestow upon Husband under Married Women's Acts.* — Again, the wife is permitted to bestow her statutory separate property upon her husband, or waive her statutory rights to a considerable extent. Thus, it is held that money used by the husband with the wife's knowledge and consent, in payment of ordinary household expenses and without any agreement for repayment to her on his part, cannot be recovered from his estate afterwards.¹ The husband may reduce to possession his wife's outstanding personals in action; but out of regard to her statutory rights, the doctrine now becomes of somewhat novel application, and evidence of the wife's consent is properly required in many States before the husband's act of appropriation shall be considered complete. For while she may bestow her goods and chattels upon him, under suitable circumstances, he can no longer go to work, as he could at the common law, and make his title complete without reference to her wishes.²

¹ *Cartwright v. Cartwright*, 53 Iowa, Green, 512; *King v. Gottschalk*, 21 Iowa, 512; *Haswell v. Hill*, 47 N. H. 57.

² *Vreeland v. Vreeland*, 1 C. E. 407.

Nor has the debtor or custodian of the incorporeal property, or the executor or administrator who settles the estate in which the married woman may have a legacy or distributive share accruing to her, the right to recognize the husband as entitled to her exclusion, or to pay over to him on his sole and unauthorized receipt.¹

§ 219. **Husband's Control under Married Women's Acts; Mixing Wife's Property or keeping it distinct.** — The greatest source of perplexity, in truth, in these married women's acts, arises out of the effort at elimination of the husband's control in the wife's statutory property; for here the safeguards usual in equitable trusts are wanting. A married woman, in order to preserve her separate property, should keep it distinct from that of her husband; and especially does the rule hold true in States where presumptions are against her exclusive right. Thus it is held that if a married woman willingly allows what she might have retained as her separate property to be so mixed into a common mass with that of the husband as to be undistinguishable, or acquiesces in leaving it so, it must, as to her husband's creditors, be treated as relinquished to him.² So, too, land or other property bought by the husband with his wife's money, but in his own name, and without any agreement that the purchase shall be to her separate use, or the title taken in her name, will not, as a rule, be treated as her separate property.³ If certain property be purchased in part from her own funds, and in part from her husband's, whatever the form of the investment, her title extends only to the amount of her investment.⁴

On the other hand, where the husband has kept his wife's funds distinct from his, though changing investments from

¹ *Aliter*, if the husband's receipt was authorized by the wife. *Hobensack v. Hallman*, 17 Penn. St. 154. Some of the local statutes are held not to restrain the husband from collecting and reducing to possession his wife's choses in action. *Clark v. Bank of Missouri*, 47 Mo. 17.

² *Glover v. Alcott*, 11 Mich. 470; *Gross v. Reddy*, 45 Penn. St. 406; *Kelly v. Drew*, 12 Allen, 107; *Cham-*

bers v. Richardson, 57 Ala. 85; *Humes v. Scruggs*, 94 U. S. Supr. 22.

³ *Kidwell v. Kirkpatrick*, 70 Mo. 214.

⁴ *Hopkins v. Carey*, 23 Miss. 54; *Worth v. York*, 18 Ired. 206; *Haines v. Haines*, 54 Ill. 74. Under Maine statutes, property conveyed to a married woman, but wholly or partly paid for by her husband, may be reached by the husband's creditors to the extent of his interest. *Call v. Perkins*, 65 Me. 489.

time to time, and preserved the ear-marks so to speak, her right to claim the property from his estate, upon surviving him, has been strongly asserted.¹ Where by the form of his transaction, as in making out a bill of sale, the title evidently stands in her, her legal right must be respected, even though some partial consideration passed from him.² And where there has been no waiver or fault on the wife's part, her title to her statutory separate property will in every instance be protected to the full extent of her interest.³ Thus, if the husband should invest the wife's legacy money, or other fund belonging to her separately by right, upon an understanding with her that the new investment shall stand in her name, his breach of trust and investment in his own name, though it be of land, will confer upon him no right to her prejudice, available to himself or to his creditors and representatives.⁴ The doctrine of merger, operating to the wife's disadvantage because of her husband's acts, is not favored by our legislation.⁵

So discordant is our married women's legislation, however, that in New York, where presumptions lean strongly to the wife's side, it is held that if household furniture belonging to a wife, and acquired from her father, is, with her consent, taken to the common dwelling, mingled with the husband's furniture, and used therewith for the common household purposes, it does not thereby become her husband's property, but the title remains in her.⁶ This doctrine, however, is applied as between the wife or her assignee, and the husband himself;⁷ and as to *bona fide* third parties for value without notice, the assertion of a wife's title as against those who have given

¹ *Fowler v. Rice*, 31 Ind. 358; *Richardson v. Merrill*, 32 Vt. 27.

² *McCowan v. Donaldson*, 128 Mass. 169.

³ *Barron v. Barron*, 24 Vt. 375. See *Holthaus v. Farris*, 24 Kans. 784.

⁴ *Van Dorn v. Leeper*, 95 Ill. 85; *Davis v. Davis*, 43 Ind. 581; *Hutchins v. Colby*, 48 N. H. 159.

⁵ *Clark v. Tennison*, 33 Md. 85. And see generally, *Hutchins v. Colby*, 43 N. H. 159; *Kirkpatrick v. Bauford*, 21 Ark. 208; *Teller v. Bishop*, 8 Minn.

226; *Leland v. Whitaker*, 23 Mich. 824; *Marsh v. Marsh*, 43 Ala. 677; *Fowler v. Rice*, 31 Ind. 258; *Pike v. Baker*, 68 Ill. 163; *Vreeland v. Vreeland*, 1 C. E. Green, 512; *Dayton v. Fisher*, 34 Ind. 856. The fact that the husband acts as the wife's agent in buying and selling, and investing her money, does not, against her consent, transfer her right of property to him. *Holcomb v. Meadville Savings Bank*, 92 Penn. St. 338.

⁶ *Fitch v. Rathbun*, 61 N. Y. 579.

⁷ *Id.*

credit to a husband in possession requires the nicest discrimination on the part of the court. Property bought by a husband with money belonging to his wife will in general be presumed to be his own until the contrary is shown;¹ and even property bought by the husband with money from the wife, which is placed in his hands for such investment in his name and for his benefit, is liable to seizure for his debts, notwithstanding she borrowed the money.² A wife may have an equitable right to pursue her funds invested by her husband, while, until this right is asserted, the husband retains a legal title of which a *bona fide* transferee for value may perhaps avail himself by way of a countervailing equity.³

§ 220. *Husband as Trustee or Agent of Property under Married Women's Acts.*—The husband, while the marriage relation lasts, may hence become bound as trustee of his wife's statutory separate estate, not only by express appointment, but through implication, as under the equity rule.⁴ In certain States, such as Connecticut and Alabama, the husband is specially designated by statute as his wife's trustee,⁵—a peculiarity of legislation which is attended with peculiar consequences as to the legal title of such property. And since the opportunities afforded him for mixing up her property with his are very great, in the present raw age of our married women's legislation, we often find her, upon surviving him, a general creditor against his estate, or the claimant of a trust fund, which cannot easily be identified.⁶ Unlike the wife's separate estate in equity, the separate property of a married woman under American statutes seems sometimes to retain

¹ *Moye v. Waters*, 51 Ga. 13. But see next c. as to his agency.

² *Nelson v. Smith*, 64 Ill. 894.

³ See *Holly v. Flournoy*, 54 Ala. 99.

⁴ *Walter v. Walter*, 48 Mis. 140; *Hall v. Creswell*, 46 Ala. 460; *Wood v. Wood*, 88 N. Y. 575; *Patten v. Patten*, 75 Ill. 446.

⁵ *Sherwood v. Sherwood*, 82 Conn. 1; *Marsh v. Marsh*, 48 Ala. 677. The personal property of a married woman, which is by the statute vested in the husband as her trustee, is not in legal

strictness her sole and separate estate, unless the husband transfers it to the wife or relinquishes his right with regard to it. *Williams v. King*, 43 Conn. 569.

The husband may sue, "as trustee of his wife," to recover rents, income, and profits of his wife's statutory separate estate. *Bentley v. Simmons*, 51 Ala. 165.

⁶ *Martin v. Curd*, 1 Bush, 337; *Haue v. Gilger*, 52 Penn. St. 412; *Fowler v. Rice*, 31 Ind. 258.

its qualities after her death, so that her administrator often claims it against her surviving husband.¹

It would appear that in general the agency of the husband in selling, exchanging, or managing his wife's separate statutory property may be previously conferred or ratified afterwards by the wife.²

§ 221. *Presumptions as to Separate Property under Married Women's Acts.* — We must here bear in mind that the married women's acts have reference, not to the wife's property in the mass, but to property suitably acquired by her in certain instances by way of exception to the old rule of coverture. Broad, therefore, as they may often appear, these statutes are considerably restrained by judicial construction and the application of presumptions. In Massachusetts, Maine, California, Wisconsin, Illinois, and other States, the presumption is still, in absence of suitable words or circumstances manifesting an intent on the part of those interested to claim the benefits of the statute, that a married woman's property belongs to her husband as at the common law; and his possession of the property, undisputed and unexplained, or even a visible possession thereof in connection with his wife, gives him the marital dominion.³ In Pennsylvania the courts were at first disposed to rule otherwise, but they too have finally settled upon the same presumption.⁴ On the other hand, the New York courts approve the new system to its widest extent, thus far; and it would appear that married women in that State are well-nigh emancipated altogether from marital restraints, so far as concerns their property, while the husband's own rights

¹ *Leland v. Whitaker*, 23 Mich. 324.

² *Lichtenberger v. Graham*, 60 Ind. 238. See next c.

³ *Eldridge v. Preble*, 34 Me. 148; *Smith v. Henry*, 35 Miss. 869; *Alverson v. Jones*, 10 Cal. 9; *Farrell v. Patterson*, 43 Ill. 52; *Reeves v. Webster*, 71 Ill. 307; *Stanton v. Kirsch*, 6 Wis. 338; *Smith v. Hewett*, 18 Iowa, 94. *Contra*, *Johnson v. Runyan*, 21 Ind. 115; *Stewart v. Ball*, 33 Mis. 154. While a husband and wife both live on her land held as general estate, the possession of the products is presumptively his.

Moreland v. Myall, 14 Bush, 474. But cf. *Hill v. Chambers*, 80 Mich. 422.

⁴ Cf. *Gamber v. Gamber*, 18 Penn. St. 368; *Winter v. Walter*, 37 Penn. St. 157; *Bear's Administrator v. Bear*, 33 Penn. St. 525; *Gault v. Saffin*, 44 Penn. St. 307; with *Goodyear v. Rumbaugh*, 18 Penn. St. 480. And see *Curry v. Bott*, 58 Penn. St. 400. Under the law of Tennessee, direct gifts to the wife enure to the husband, unless the separate estate intention is clearly expressed. *Ewing v. Helm*, 2 Tenn. Ch. 368.

therein are exceedingly precarious.¹ To ascertain as a fact whether the ownership be in wife or husband, evidence of how the matter was understood and treated between the spouses may be quite essential;² for a sort of joint possession on their part is often the practical situation of the case.

As the rule is usually expounded, presumptions bear heavily against the wife in contests of title, but more especially where the rights of a husband's creditors are affected by the decision. "Between strangers," it is observed in a Pennsylvania case, "open, visible, notorious, and exclusive possession is the test of title in all cases where the rights of creditors are involved. But this is not possible with reference to the personal goods of a married woman. She cannot have or use her property exclusively, unless she lives apart from her husband. It was not the intention of the legislature to compel a separation in order to save the wife's rights; but if the rule of exclusive possession were adopted, the statute would be inoperative as long as they live together. But this shows how necessary it is to demand the clearest proof of the wife's original right."³

§ 222. **Schedule or Inventory as Proof of Married Woman's Title.**—The requirement in a few States is that the wife's separate property shall be scheduled or inventoried in order to receive legal protection for her separate benefit. Considering the fallibility of presumptions and of the usual tests, this plan seems worthy of more extensive introduction in the legislation of the various States relative to married women.⁴ Such provisions are sometimes construed as mere registry requirements, not essential as against parties having actual knowledge of the wife's title, — a husband, for instance, — and only intended to prevent frauds and impositions as to creditors and purchasers.⁵ The mode of acquisition consti-

¹ *Peters v. Fowler*, 41 Barb. 467; *Knapp v. Smith*, 27 N. Y. 277.

² *Hill v. Chambers*, 30 Mich. 422. In this State the obvious inclination is to determine, not by presumptions or inferences, but upon the facts. *Ib.*

³ *Gamber v. Gamber*, 18 Penn. St. 363. And see *Kenney v. Good*, 21 Penn. St. 349.

⁴ *Price v. Sanchez*, 8 Fla. 136; *Humphries v. Harrison*, 30 Ark. 79. As to the filing of such a schedule by the woman prior to her marriage, see *Berlin v. Cantrell*, 38 Ark. 611.

⁵ *Jones v. Jones*, 19 Iowa, 236; *Selover v. Commercial Co.*, 7 Cal. 266. This registry law, after having called for considerable construction in the

tutes in such case the actual title to the wife's separate property; but, even with this limited application, the schedule regulation enables the wife to secure her own interests where the possession of personal property, such as household furniture, is essentially that of both husband and wife, so long as they dwell together, and fraudulent credit ought not to be permitted on behalf of either spouse. These schedule provisions are based, doubtless, upon the principle that the property in joint possession of husband and wife under his marital control is presumably his.

§ 223. *The Statutory Separate Property and Equitable Separate Property.*—In New York and Mississippi it is held that the married women's act does not oust the original jurisdiction of courts of equity in cases affecting the separate estates of married women.¹ Speaking of the legislation in the former State, the court observes that the statutes of 1848 and 1849 are but the legislative adoption of the equitable rules, and their application to all property of the wife whether legal or equitable. "The evil complained of was the too great subjection of the property of the wife, at common law, to the control of the husband and his creditors. The remedy was to apply the rule of this court, in respect to the separate property of married women, to all property belonging to the wife. It is true the property is thus converted into a legal estate, but it is none the less a separate estate, independent of the husband."² So, too, in a Michigan case, it is observed that, as regards the wife's individual property, the married women's legislation has done little more than to give legal rights and remedies to the wife, where before, by settlement or contract, she might have established corresponding equitable rights and remedies.³ That this legislation, properly so called, does not profess to operate upon the family relation,

courts, appears to have finally been repealed in Iowa. *Schmidt v. Holtz*, 44 Iowa, 448.

¹ *Mitchell v. Otey*, 23 Miss. 286; *Colvin v. Currier*, 22 Barb. 871 (Strong, J., dissenting). See the recent case of *Wood v. Wood*, 83 N. Y. 575, where Folger, C. J., observes that the married

women's acts, by their own operation, changed the wife's capacity to hold a separate estate as a matter of equity into a legal estate.

² *Colvin v. Currier*, 22 Barb. 882.

³ *Snyder v. People*, 26 Mich. 106. And see *Clawson v. Clawson*, 25 Ind. 229.

or take from the husband his marital rights, except as pertaining to property, is frequently insisted upon.¹

"The estate thus assured to the wife," as a Pennsylvania case well observes, "is only analogous to the equitable separate estate, and is seriously modified by the fact that she has no trustee separate from her husband; and that he, therefore, as the legal guardian of her rights, necessarily becomes, in a large sense, her trustee, but without all of the law's suspicion of his dealing with the trust property, for the community of interests and sympathies of husband and wife forbid this."²

§ 224. **American Equity Doctrines borrowed from England; whether a Trustee need be appointed.** — Doubtless the married women's acts have given a fresh impulse to the equitable protection of married women's property, which, as we have stated, had been quite sparingly exercised in the United States prior to the first legislative enactments on this subject. Where the separate use has been recognized and enforced at all, the strict American rule was always borrowed from that of England. And the latest cases show an increasing liberality to the wife in our courts of equity. Thus it has been frequently said that the wife's separate estate requires no trustee to sustain it.³ For when no other trustee is interposed the courts of chancery are prepared to treat the husband as such by virtue of his possession and control of the fund.⁴

¹ *Snyder v. People*, 26 Mich. 106. A conveyance to a married woman's separate use does not create in her a separate estate by contract, in opposition to her separate estate by statute, where a large portion of the purchase-money came from her separate statutory estate. *Molton v. Martin*, 43 Ala. 651.

² *Lowrie, C. J.*, in *Walker v. Reamy*, 36 Penn. St. 410, 414.

³ *McKennon v. Phillips*, 6 Whart. 571; *Thompson v. McKusick*, 3 Humph. 631; *Fellows v. Tann*, 9 Ala. 999; *Trenton Banking Co. v. Woodruff*, 1 Green Ch. 117.

⁴ *Boykin v. Ciples*, 2 Hill Ch. 200; *Hamilton v. Bishop*, 8 Yerg. 33; *Wal-*

lingsford v. Allen, 10 Pet. 583; *Porter v. Bank of Rutland*, 19 Vt. 410; *Pepper v. Lee*, 53 Ala. 33; *Richardson v. Stodder*, 100 Mass. 528; *Wilkinson v. Cheatham*, 45 Ala. 837. And see *Wood v. Wood*, 83 N. Y. 575; *Re O'Brien*, 11 R. I. 419; *Harkins v. Coalter*, 2 Port. 463; *Franklin v. Creyon*, 1 Harp. Ch. 248; *Freeman v. Freeman*, 9 Mis. 763; *Holthaus v. Hornbostle*, 60 Mo. 439. A court of general equity jurisdiction has power to appoint a husband to be trustee in a trust for the wife's separate benefit, and such appointment is valid. *Ely v. Burgess*, 11 R. I. 115. But in ordinary cases there are reasons against selecting the husband. *Id.*

And one may, by his acts, make himself a trustee *sub modo* to support the wife's separate use.¹ Even a purchaser, still more a volunteer, taking possession of the trust property, with a notice of the trust, will be made a trustee in chancery.²

§ 225. **Equity Doctrine; Intention needful; What Words and Acts suffice for Separate Use.**— So, too, an intention clearly manifested to create a separate estate has always been deemed necessary in our courts, in order to exclude the husband's marital rights. The mere intervention of a trustee is insufficient.³

The language employed, if language be necessarily relied on, must be suitable. Thus in North Carolina, the words, "for her use," have been held sufficient to exclude the husband's dominion.⁴ So, too, the words, "for the entire use, benefit, profit, and advantage."⁵ But in South Carolina, the words, for "the use of his wife," are held insufficient.⁶ In Kentucky, the words, "for her own proper use and benefit," are held sufficient.⁷ Such, too, seems to have been the rule in Alabama.⁸ The words, "to the use and benefit," are held sufficient in Tennessee.⁹ So in Alabama, words importing enjoyment, "without let, hindrance, or molestation whatever."¹⁰ And where one clause of a will applies the words, "in trust for the separate use," to certain property, and another applies to certain property the words "in trust" only, the separate use may by construction embrace the whole.¹¹ The word "exclusively" in the wife's favor is

¹ Sledge v. Clopton, 6 Ala. 589.

² Jackson v. McAliley, Speers Eq. 303; Fry v. Fry, 7 Paige Ch. 461.

³ Hunt v. Booth, 1 Freem. Ch. 215; Evans v. Knorr, 4 Rawle, 66; Graham v. Graham, Riley, 142; Taylor v. Stone, 13 S. & M. 653; Lenoir v. Binney, 15 Ala. 667. In Georgia a husband may be held liable in equity as a trustee *sub modo*, where he recognized the property as the separate property of his wife, even though the language was insufficient *per se*. Mounser v. Duke, 53 Ga. 277.

⁴ Steel v. Steel, 1 Ired. Eq. 452; Good v. Harris, 2 Ired. Eq. 630.

⁵ Heathman v. Hall, 3 Ired. Eq. 414.

⁶ Tennant v. Stoney, 1 Rich. Eq. 222; M'Donald v. Crockett, 2 McC. Ch. 180.

⁷ Griffith v. Griffith, 5 B. Monr. 113.

⁸ Warren v. Halsey, 1 S. & M. Ch. 647.

⁹ Hamilton v. Bishop, 8 Yerg. 83.

¹⁰ Newman v. James, 12 Ala. 29. And see Clarke v. Windham, *ib.* 798.

¹¹ Davis v. Cain, 1 Ired. Eq. 304. See further, as to words which constitute a separate estate, Wilson v. Bailer, 3 Strobb. Eq. 258; Clark v. Maguire, 16 Mis. 302; Goodrum v. Goodrum, 8 Ired. Eq. 818; Denson v. Patton, 19 Geo. 577; Bradford v. Greenway, 17 Ala. 797.

held to exclude the husband.¹ So, too, "to be hers and hers only."²

Trust, to pay income to a wife³ "for and during the joint lives of her and her husband, taking her receipt therefor," is held to give her a sole and separate estate in the income.⁴ Trust to "exclusive use, benefit, and behoof," is held sufficient to create a separate use.⁵ So, too, "for her own use and benefit, independent of any other person."⁶ So, too, "absolutely," in a suitable connection.⁷ So, too, "to be for her own and her family's use during her natural life."⁸ Or, "for the use and benefit of the wife and her heirs."⁹ Or, "not to be sold, bartered, or traded by the husband."¹⁰

On the other hand, there is authority against permitting such expressions as these to create the separate use. "For the use and benefit of."¹¹ Or, to the wife "in her own right," as in the English cases.¹² Or, "for the joint use of husband and wife."¹³ Or, "to her and the heirs of her body and to them alone," and similar expressions.¹⁴ Or where, instead of restraint of husband's right of disposition, is stated a mere exemption from liability for his debts.¹⁵ Or, to some one's wife, without further exclusive description.¹⁶

§ 226. **Creation of Separate Use in Equity; Subject continued.**—But the words, to the wife's "sole and separate use," are most commonly applied.¹⁷ Or, "solely for her own

¹ Gould v. Hill, 18 Ala. 84.

² Ellis v. Woods, 9 Rich. Eq. 19; Ozley v. Ikelheimer, 26 Ala. 332.

³ As to income, increase, and profits, see *supra*, § 215.

⁴ Charles v. Coker, 2 S. C. n. s. 122.

⁵ Williams v. Avery, 38 Ala. 115.

⁶ Williams v. Maull, 20 Ala. 721; Ashcraft v. Little, 4 Ired. Eq. 236.

⁷ Brown v. Johnson, 17 Ala. 232; Short v. Battle, 52 Ala. 456.

⁸ Heck v. Clippenger, 5 Penn. St. 385; Hamilton v. Bishop, 8 Yerg. 38.

⁹ Good v. Harris, 12 Ga. 680.

¹⁰ Woodrum v. Kirkpatrick, 2 Swan, 218; Clarke v. Windham, 12 Ala. 798.

¹¹ Clevestine's Appeal, 15 Penn. St. 499; Fears v. Brooks, 12 Ga. 198; Tenant v. Stoney, 1 Rich. Eq. 222; Prout v. Roby, 15 Wall. 471; Merrill v. Bul-

lock, 105 Mass. 486; Guishaber v. Hairman, 2 Bush, 320.

¹² *Ib.*; *supra*, § 193.

¹³ Geyer v. Branch Bank, 21 Ala. 414. Cf. Charles v. Coker, 2 S. C. n. s. 122. See *post*, Part VII., as to conveyances to husband and wife.

¹⁴ Clevestine's Appeal, 15 Penn. St. 499; Bryan v. Duncan, 11 Ga. 67; Foster v. Kerr, 4 Rich. Eq. 890.

¹⁵ Harris v. Harbeson, 9 Bush, 397; Gillespie v. Burlinson, 28 Ala. 551. But see Young v. Young, 3 Jones Eq. 266.

¹⁶ Moore v. Jones, 18 Ala. 296; Fitch v. Ayer, 2 Conn. 148; Shirley v. Shirley, 9 Paige, 864.

¹⁷ See last chapter, § 192; Robinson v. O'Neal, 56 Ala. 541; Swain v. Duane, 48 Cal. 358; Short v. Battle, 52 Ala. 456.

use."¹ Or, "for the sole use and benefit of."² A gift or bequest to "a married woman and her children, born and thereafter to be born," does not invest her with an estate to her sole and separate use, but makes her a tenant in common (joint-tenancy having been abolished) with her children.³ And it would appear, in general, that where property is given for the use and support of two or more together, one of them being a married woman, it cannot be considered as vesting a separate estate in the married woman; for exclusiveness of enjoyment is an important element in such estates.⁴ This doctrine is not inconsistent with the well-established right of a donor to make a trust first to the wife's separate use, then over to some one else, provided the instrument uses apt language for that purpose.⁵ And provisions for the sole and separate use, support, and maintenance of a wife and children are frequently sustained, though the trust does not vest their respective interests consecutively.⁶

As in England, our courts permit an estate to be so settled on an unmarried female as to exclude the marital rights of any future husband.⁷

§ 227. **Creation of Separate Use in Equity; Summary of American Doctrine.** — On the whole, it is apparent that there is much contrariety in the decisions, so far as relates to technical expression. Courts of equity, as such, will not deprive the husband of his legal rights upon any doubtful construction of language.⁸ But the question relates rather to intention, to substance, and not literal expression; and any language

¹ *Id.*; *Snyder v. Snyder*, 10 Penn. St. 423; *Jarvis v. Prentice*, 19 Conn. 273; *Goodrum v. Goodrum*, 8 Ired. Eq. 813; *Griffith v. Griffith*, 5 B. Mon. 118; *Stuart v. Kissam*, 3 Barb. 494.

² *Blakeslee v. Mobile Life Ins. Co.*, 57 Ala. 205; *Miller v. Vose*, 62 Ala. 122.

³ *Dunn v. Bank of Mobile*, 2 Ala. 152.

⁴ *Harkins v. Coalter*, 2 Port. 463; *Clancy Hus. & Wife*, 269; *Inge v. Forrester*, 6 Ala. 418. A provision that three daughters shall "enjoy their respective portions as they see fit," does not exclude their husbands. *Wood v. Polk*, 12 Heisk. 220. But cf. *Metropolitan Bank v. Taylor*, 53 Mo. 544.

⁵ See *Warren v. Haley*, 1 S. & M. Ch. 647.

⁶ *Good v. Harris*, 2 Ired. Eq. 630; *Hamilton v. Bishop*, 8 Yerg. 88; *Anderson v. Brooks*, 11 Ala. 953.

⁷ *Beaufort v. Collier*, 6 Humph. 487; *O'Kill v. Campbell*, 8 Green Ch. 13. As to a settlement upon several daughters free from the liabilities and control of their respective husbands, see *Ordway v. Bright*, 7 Heisk. 681.

⁸ *Buck v. Wroten*, 24 Gratt. 250; *Bowen v. Lebre*, 2 Bush, 112.

is now deemed usually sufficient, whatever the technical words, which clearly expresses the intent to create a separate estate for the wife, independent of her husband's control.¹

In the courts of this country, moreover, the statute policy is found to supplement equity. As a general rule an equitable trust by instrument requires the construction of that instrument to operate. But this does not necessarily conclude the wife. For, while an equitable separate estate is created, where the intent to exclude the marital rights of the husband clearly and unequivocally appears from the force and certainty of the terms employed, the local statute may intervene where the intent is doubtful, equivocal, or open to speculation, and fix the character of the estate as the wife's separate statutory and legal estate.² On the other hand, a conveyance or trust duly created for a married woman's separate benefit and duly expressed, is to be regarded as her equitable rather than her statutory estate.³

§ 228. **American Equity Doctrine ; Creation of a Parol Separate Use.** — In Vermont, it is decided that a third person may create a parol trust for a married woman's exclusive benefit ; except as to landed property, which falls within the statute of frauds. Thus in a case where it appeared that the father of a married woman had intimated to her and her husband, in conversation, that he was about to make her an advance in money, which he wished to have invested for the benefit of herself and her children, and that he had subsequently enclosed in a letter to her husband, a check for \$1,000, payable to his daughter, or bearer, expressing in the letter a wish that the money might be invested for the mutual benefit of his daughter and her heirs, leaving the mode to be determined by her and her husband, on consultation between them ; also, that she had at the time of the suit three children ; the court considered that there had been a trust created for the exclusive benefit of the donor's daughter and her children ; and the husband was taken to be the trustee, as against his own creditors who had attached certain bank

¹ See *Prout v. Roby*, 15 Wall. 471 ;
Gaines v. Poor, 3 Met. (Ky.) 508.

² *Short v. Battle*, 52 Ala. 456.

³ *Pepper v. Lee*, 58 Ala. 33 ; *Musson v. Trigg*, 51 Miss. 172.

stock which he purchased in his own name with such funds; the evidence showing that the creditors had received notice that the stock was held in trust.¹

There are other American decisions in which (independently of gifts or settlements from the husband himself) a separate estate in personal property is held to be created in a married woman by a parol gift, where the evidence to establish it is clear and satisfactory.²

§ 229. **Equity Doctrine; Informalities overlooked; Whether Fraud debars Wife.**—Our courts of equity will sometimes overlook informalities in order to give effect to the wife's separate use. As where a deed of trust to a commissioner has been ordered by the court, but never executed, and the commissioner gives possession to the husband in the mean time.³ Or where a deed has not been recorded in compliance with the statute.⁴ So a trust may be enforced, although the details of the arrangement cannot be ascertained by the most stringent proof.⁵ No informality as to trustee need, of course, injuriously affect the wife's interest.⁶

The wife cannot be debarred of her separate estate through the fraud of others; it must be a fraud to which she is a party, that will bar her beneficial title.⁷ Nor will the insolvency of her husband affect her acquisition through a third party.⁸

§ 230. **Equity Doctrine; Acquisition by Contract; Terms of Trust.**—A married woman cannot by contract acquire any property to her separate use; but the benefit of her contract,

¹ *Porter v. Bank of Rutland*, 19 Vt. 410. Mr. Macqueen suggests the opinion that a parol trust would be good in England, though admitting that he finds no decision of the question. Marriage settlements, however, may be affected by the statute of frauds. *Macq. Hus. & Wife*, 293.

² *Betts v. Betts*, 18 Ala. 787; *Watson v. Broadus*, 6 Bush, 328; *Spaulding v. Day*, 10 Allen, 96.

³ *Jackson v. McAliley*, *Speers Eq.* 803.

⁴ *Hamilton v. Bishop*, 8 Yerg. 33.

⁵ *Sledge v. Clopton*, 6 Ala. 589.

⁶ *Jackson v. McAliley*, *Speers Eq.*

803. And as to stopping a husband by his admissions of a separate use, though the language was insufficient, see *Mounger v. Duke*, 53 Ga. 277; *Fry v. Fry*, 7 Paige Ch. 461; *Sledge v. Clopton*, 6 Ala. 589; *supra*, § 194.

⁷ *Jackson v. McAliley*, *Speers Eq.* 803.

⁸ *Holthaus v. Hornbostle*, 60 Mo. 489. It is not essential that the words in a deed designed to create a separate estate for a married woman appear in the granting clause or the *habendum* clause. *Morrison v. Thistle*, 67 Mo. 596.

if any, enures to her husband.¹ Where, however, a married woman, with her husband's consent, purchases lands which she was the meritorious cause of acquiring, and takes a deed to another, it is held in Vermont that a trust results in her favor.² On the other hand, if a testator gives a legacy to trustees for the use of a daughter, and directs that it may be invested in real estate for her use, if she should desire it, and that the trustees should take the title in the name of the daughter only, though married, the trustees must follow his directions, and they cannot take a title in any other name, though by taking it in the name of the daughter, the property might be subjected to the husband's debts.³

§ 231. **Equity Doctrine; Separate Use binds Produce of Fund.** — The savings of the interest arising from the separate estate of a married woman are as much separate property as the principal, unless she has suffered them to pass under her husband's marital control. And property purchased with such savings belongs to her and continues subject to the same rules.⁴ But furniture purchased by the wife with the income of her separate estate, and mixed with the furniture of the husband, becomes presumably the property of the husband, unless it was understood between them, at the time of the purchase, that the property should be kept by him as her trustee merely;⁵ for it is both natural and proper that the wife should bestow her income so as to follow the commonlaw rule, thus helping to defray the family expenses and maintain the household establishment.

§ 232. **Equity Doctrine; As to preserving Identity of Wife's Separate Funds.** — Indeed, as to mingled funds generally, the rule applies that equity will not interfere where a fund set apart for the wife's sole benefit has become mixed with other funds beyond the possibility of identification.⁶

But, on the other hand, the proceeds of a transfer of the wife's separate property, which it is understood shall be the

¹ *Lansier v. Ross*, 1 Dev. & Bat. Eq. 89. *Hort v. Sorrell*, 11 Ala. 386. See *Kee v. Vasser*, 2 Ired. Eq. 558. See *supra*,

² *Pinney v. Fellows*, 15 Vt. 525. And § 195. ⁵ *Shirley v. Shirley*, 9 Paige, 363.

see *Pulliam v. Pulliam*, 1 Freem. Ch. 348.

³ *Vernon v. Marsh*, 2 Green Ch. 502.

⁴ *Merritt v. Lyon*, 3 Barb. 110; § 294, *post*. ⁶ *Buck v. Ashbrook*, 59 Mo. 200;

wife's, may be followed by her in equity, provided she can trace the identity, and has acted consistently with her claim of title, even though the husband takes the title in himself.¹ A distinction may sometimes be requisite between the case where a wife asserts her equitable title against her husband, and that where her title is claimed against *bona fide* purchasers from the husband, having neither actual nor constructive notice of her title.²

Where the wife's separate estate is sold for a debt of the ancestor from whom it descended, it has been held in New York that the surplus belongs to the husband.³ And where a wife joins with her husband in the conveyance of her land, without any understanding or agreement that the proceeds are to be applied to her separate use, such proceeds vest absolutely in him discharged of all claims on her part.⁴ For the presumption in such cases is that she voluntarily abandons her separate use in his favor; though the question after all is one of evidence.⁵

§ 233. **Equity Doctrine; Separate Use continues only during the Marriage State.** — In the United States, as in England, the separate estate in equity continues only during the marriage state, with probably similar qualifications.⁶ The husband surviving his wife has the same rights in her separate estate, as in her other property, even though another be appointed administrator.⁷ The estate of the trustee, as such, terminates on the wife's death.⁸ And yet if the husband, on survivorship, is entitled to his wife's separate personal estate by virtue of his marital rights, he must, in order to obtain it from others, and have a firm title against creditors, take out letters of administration, as American cases hold, — at least where antenuptial debts of the wife have not been recovered during marriage.⁹

Where a conveyance is made in trust for the separate use

¹ *Dula v. Young*, 70 N. C. 450; *Haden v. Ivey*, 51 Ala. 881.

² See *supra*, § 200.

³ *Wood v. Genet*, 8 Paige, 187.

⁴ *Chester v. Greer*, 5 Humph. 26; *Temple v. Williams*, 4 Ired. Eq. 39.

⁵ *Temple v. Williams*, 4 Ired. Eq. 39.

⁶ *Supra*, § 196.

⁷ *Spann v. Jennings*, 1 Hill Ch. 325; *Good v. Harris*, 2 Ired. Eq. 630; *McKay v. Allen*, 6 Yerg. 44. And see *Cooney v. Woodburn*, 33 Md. 320, where wife left no issue surviving.

⁸ *Bercy v. Lavretta*, 63 Ala. 874.

⁹ *McKay v. Allen*, 6 Yerg. 44.

of a married woman, or for such person as she should direct, and she makes no appointment, it is held in Pennsylvania that the trustee after her death is entitled to recover the property for her representatives.¹

§ 234. *Equity Doctrine; Ambulatory Operation; Widowhood, &c.* — Consistently with its intent, the separate use may have an ambulatory operation, ceasing when the wife becomes a widow, and, if left undisposed of, reviving, supposing she marries again.² Where the trust for a wife's sole benefit is expressed to be free from the control of "any present or future husband," equity will not set the trust aside on the death of a husband.³ But it is held in this country that if a married woman having a separate estate survives her husband, the restraints upon the disposal of the estate, inconsistent with its general character, cease with the coverture.⁴ Moreover, in Pennsylvania it is held that they do not revive on her second marriage,⁵ though this is contrary to the general rule of equity, unless the trust was plainly confined to a particular husband or particular coverture.⁶ And where, by a will, personal estate was given to a trustee, in trust, to pay over the profits to a daughter of the testator, a married woman, semi-annually, for her sole benefit during her life, the will containing no provision for a second marriage of the daughter, it has been held in North Carolina that upon the death of the husband the separate use ends, and does not revive upon the remarriage of the beneficiary; but that on the contrary the second husband's marital rights attach upon the property.⁷

Conformably to Pennsylvania precedents, it is also held in that State that, unless at the time the trust was created the woman was married, or unless in direct contemplation of marriage, a separate use for her benefit cannot be created, so as to take effect if she marries subsequently.⁸ But, as we have

¹ *Dinsmore v. Biggert*, 9 Penn. St. 188.

² *Supra*, § 197.

³ *O'Kill v. Campbell*, 8 Green. Ch. 18.

⁴ *Smith v. Starr*, 3 Whart. 62; *Pooley v. Webb*, 8 Cold. 599; *Thomas v. Harkness*, 13 Bush, 28.

⁵ *Hamersley v. Smith*, 4 Whart. 126.

⁶ *Supra*, § 197; *Shirley v. Shirley*, 9 Paige, 364; *Beaufort v. Collier*, 6 Humph. 487; *Waters v. Tazewell*, 9 Md. 291; 2 *Perry Trusts*, § 652.

⁷ *Miller v. Bingham*, 1 Ired. Eq. 423.

⁸ *Snyder's Appeal*, 92 Penn. St. 604, and cases cited in opinion.

seen, the English rule is to the contrary; or in other words that a trust for separate use may be effectually created, notwithstanding the woman is unmarried, and contemplates no particular marriage, and that the trust, meantime remaining suspended, will assert itself on her marriage,¹ no disposition thereof having taken place. This same ambulatory operation appears to prevail usually in the United States.²

§ 235. **Equity Doctrine; whether Separate Use affects Husband's Marital Obligations.** — The English doctrine that the wife's separate estate is not necessarily liable for her own general or ante-nuptial debts is also admitted here. Thus it is held in New York that the only ground on which the wife's separate property can be reached for her antenuptial debts is that of appointment; that is, some act of hers after marriage which indicates an intention to charge the property.³ Nor can the bankruptcy of the husband, although it suspends the legal remedy against the wife during coverture, afford any ground for proceeding in equity to charge her separate estate.⁴ Nor, in the absence of an intention on the wife's part to make such estate liable, can it be subjected to her general debts contracted during coverture.⁵ But in Mississippi a disposition has been manifested to overturn this doctrine, and to establish a new and fairer rule in equity; and it is held that the wife's separate property, owned before marriage, may be thus subjected to the payment of necessities furnished her while sole and a minor,⁶ and a similar rule prevails in some other States.⁷

¹ *Supra*, § 197; *Tullett v. Armstrong*, 1 Beav. 1.

² *Bercy v. Lavretta*, 68 Ala. 374; 2 *Perry Trusts*, §§ 652, 653, and cases cited.

³ *Vanderheyden v. Mallory*, 1 Comst. 452.

⁴ *Ib.*; *Peace v. Spierin*, 2 Desaus. 460.

⁵ *Dickson v. Miller*, 11 S. & M. 594; *Knox v. Pickett*, 4 Desaus. 92; *Gee v. Gee*, 2 Dev. & Bat. 108; *Haygood v. Harris*, 10 Ala. 291; *Curtis v. Engel*, 2 Sandf. Ch. 287.

⁶ *Dickson v. Miller*, 11 S. & M. 594. "In marriage," observes Mr. Justice

Thacher, "although a husband runs the hazard of becoming liable for his wife in an amount greater than the value of the estate he receives by her, he also has the chance of receiving by her an amount far exceeding her debts. But where the whole estate of a wife, notwithstanding coverture, continues separate to her, there is no such recompense to the husband for his obligation for his wife's debts, but on the contrary, there may be a certainty of his becoming indebted on behalf of his wife, with no possibility of his receiving an amount even equal to her debts," *Ib.*

⁷ *Cater v. Eveleigh*, 4 Desaus. 19;

In general the husband's obligation to maintain his wife and family remains unaffected by the fact that the wife holds separate property. This rule is fully asserted in New York. For it is declared that, though by a marriage settlement the wife's whole property is secured to her separate use, her husband is nevertheless bound to maintain her, and cannot make the expenses a charge on her separate estate. Nor can the admissions of the wife, during coverture, that the expenses were to be borne by her separate estate, be set up by the husband to impair her right, under the settlement.¹ "The utmost I can do in this case," observed Chancellor Kent, "is to allow the husband to be credited with any necessary reparations bestowed by him on any part of her estate, and with any particular specific appropriation of her property (not being for the ordinary maintenance of her or his family) which may have been made by her special assent and direction in the given case, and apparently for her benefit."²

§ 236. **Equity Proceedings as to Wife's Separate Estate.**— Upon a bill by husband and wife to recover her separate property, the court may decline to make the husband trustee, and order payment to be made to some third person as trustee for her.³ And where real estate is conveyed in trust for a married woman, and to such person as she shall appoint, it is not necessary that the husband should join in the appointment.⁴ So on a suit, either by the husband or the wife, in relation to the wife's separate real and personal estate, a suitable maintenance will be provided for her, even as against the husband's execution creditor, and even though her equity extends to the whole estate.⁵

§ 237. **Restraint upon Anticipation in Equity** — American courts have seldom to consider clauses of restraint against

Young v. Smith, 9 Bush, 421. Upon husband from setting aside his own this subject, from the statutory point of bargain.

¹ Meth. Ep. Church v. Jaques, 1 Johns. Ch. 450.

² *Ib.* It may be said that the above case arose out of an antenuptial contract between husband and wife, and that the court merely restrained the

³ Boykin v. Ciples, 2 Hill Ch. 200.

⁴ Thompson v. Murray, 2 Hill Ch. 204; 4 Kent Com. 818.

⁵ Haviland v. Myers, 6 Johns. Ch. 25; Haviland v. Bloom, *ib.* 178; Barrett v. Oliver, 7 Gill & J. 191; Slowman v. Perryclear, Riley, ch. 47.

anticipation or alienation,¹ a subject which the English chancery courts have considered at much length. Restraining a wife's power to deal with her separate property seems, in American policy, too much like denying her a separate property. Yet there are good grounds for such constraint; and in various instances our State courts find occasion to recognize such clauses. The restraint is held, as in England, to apply equally to real or personal property, and to estates in fee or for life.² It will come into operation, like the separate use to which it is attached, where a woman marries; but it exists only in the marriage state, since one *sui juris* is unrestrainable by any such means from exercising the ordinary rights of ownership, whether widow or maiden.³

CHAPTER IV.

THE WIFE'S DOMINION OVER HER EQUITABLE SEPARATE PROPERTY.

§ 238. **General Principles of Dominion over Separate Property.** — The right to enjoy property carries with it, universally, as a necessary incident, the right of its free disposal. All other things then being equal, we shall expect to find that married women, when allowed to hold estate to their separate use, are permitted to sell, convey, give, grant, bargain, or otherwise dispose of it; and further, to encumber it with their debts as they please. Public policy may, however, restrain their dominion. We shall treat in this chapter of the English equity rule on this subject, noting, as we proceed, whether the American equity rule differs in any respect. In short, our first discussion relates to the wife's dominion over her equitable separate property. The wife's dominion

¹ *Supra*, § 202.

² *Freeman v. Flood*, 16 Ga. 528; *Dicta* in *Wilburn v. McCalley*, 63 Ala. 436; *Burnett v. Hawpe*, 25 Gratt. 481.

³ *Wells v. McCall*, 64 Penn. St. 207; *Parker v. Converse*, 5 Gray, 336.

There must be a clear and unequivocal expression of intent to restrain the *jus disponendi*. A declaration that the property shall not be liable for her debts, &c., is insufficient. *Witsell v. Charleston*, 7 S. C. 88; *Radford v. Carwile*, 13 W. Va. 572.

over statutory separate property, or that held under our married women's acts, will be reserved for the chapter succeeding.

§ 239. **Wife, unless restrained, takes Separate Property, with Power of Disposition.**— The clause of restraint upon anticipation or alienation, and its important effect upon the wife's power of disposal, we have already dwelt upon. Apart from this, in England it is the general rule, so far at least as concerns personal property, that from the moment the wife takes the property to her sole and separate use, from the same moment she has the sole and separate right to dispose of it; for, upon being once permitted to take personal property to her separate use as a *feme sole*, she takes it with all its privileges and incidents, including the *jus disponendi*.¹ And while she may be restrained by language of the instrument under which her title is acquired, amounting to a clause restraining anticipation, for instance, yet the intention to restrain her must be clearly expressed; or else she may deal with the property as she pleases, either by acts *inter vivos* or by testamentary appointment.²

Her power of disposition is not confined to interests vested in possession, but extends to reversionary interests settled to her separate use.³

§ 239a. **Same Principle applies to Income, Profits, &c.**— The same principle applies to the income and profits and rents of the wife's separate property. The wife has the same control over her savings out of her separate estate as over the separate estate itself; "for," to use the somewhat involved metaphor of Lord Keeper Cowper, so often quoted, "the sprout is to savor of the root, and to go the same way."⁴

Following this general doctrine, the wife, if unrestricted by

¹ *Fettiplace v. Gorges*, 1 Ves. Jr. 48; *Ves.* 192; *Headen v. Roshier*, 1 M'Cl. & 3 Bro. C. C. 9; *Peachey Mar. Settl.* 261, 262. See 20 & 21 Vict. c. 57, the "reversionary act."

² *Rich v. Cockell*, 9 Ves. 369; *Moore v. Morris*, 4 Drew. 38; *Darkin v. Darkin*, 17 Beav. 581; *Caton v. Rideout*, 1 Mac. & Gord. 601.

³ 2 *Bright Hus. & Wife*, 222; *Macq. Hus. & Wife*, 295; *Sturgis v. Corp*, 13

⁴ *Gore v. Knight*, 2 Vern. 535; s. c. *Prec. in Ch.* 255. See also *Messenger v. Clarke*, 5 Exch. 392; *Peachey Mar. Settl.* 262; *Newlands v. Paynter*, 10 Sim. 377; s. c. on appeal, 4 M. & Cr. 408; *Humphery v. Richards*, 2 Jur. n. s. 432.

the terms of the trust, may anticipate and encumber rents settled apart for her separate use.¹ But where the trust, by suitable expression, restrains the wife from anticipation, permitting her only to receive the income from her trustee from time to time as it falls due, she cannot anticipate and encumber her income.²

§ 240. *Technical Difficulties as to Disposing of Real Estate.* — Where the wife's separate property consists of real estate, her power of disposition is affected by technical difficulties as to the method of executing conveyances.³ But it has been suggested in England that, according to the principle of modern equity cases, the heir ought to be treated as a trustee, in case the wife had conveyed her beneficial interest by deed executed by herself alone, and that thus her sole conveyance would be allowed to operate.⁴ In most parts of the United States a married woman can only dispose of her real estate, whether legal or equitable, by a conveyance according to statute, which the husband executes in token of assent; a partial reason for this being that the husband has his rights of curtesy even in lands settled to his wife's separate use.⁵ Rents and profits of her separate land, or an annuity charged upon land, follow the more liberal rule of personal property held as her separate estate,⁶ unless afterwards converted into land.⁷

§ 241. *English Doctrine as to Liability of Separate Estate on Wife's Engagements.* — As a corollary to our proposition the

¹ Cheever v. Wilson, 9 Wall. 108.

² Chancellor Kent, in *Jaques v. Methodist Episcopal Church*, 3 Johns. Ch. 77.

³ 2 Roper Hus. & Wife, 182; 1 Bright Hus. & Wife, 224. See *Ex parte Ann Shirley*, 5 Bing. 226, cited in *Macq. Hus. & Wife*, 296. See also *Peachey Mar. Settl.* 267; *Harris v. Mott*, 14 Beav. 169.

⁴ *Macq. Hus. & Wife*, 296, 297; 2 Story Eq. Juris. § 1390, and cases cited; 3 Sugd. V. & P. App. 62; *Newcomen v. Hassard*, 4 Ir. Ch. 274; *Burnaby v. Griffin*, 3 Ves. 266; *Peachey Mar. Settl.* 268. The statute referred to as raising technical difficulties in real estate is 3 & 4 Will. IV. c. 74.

⁵ *Shipp v. Bowmar*, 5 B. Mon. 163; *Radford v. Carwile*, 18 W. Va. 572; 2 *Perry Trusts*, § 656; *supra*, §§ 175-180; *McChesney v. Brown*, 25 Gratt. 393; *Koltenback v. Cracraft*, 36 Ohio St. 584; *Miller v. Albertson*, 73 Ind. 348. But in New York, by way of an appointment, a married woman may convey such interests without the joinder of her husband. *Albany Fire Ins. Co. v. Bay*, 4 Comst. 9. See *Armstrong v. Ross*, 5 C. E. Green, 109.

⁶ *Cheever v. Wilson*, 9 Wall. 108; *Vizoneau v. Pegram*, 2 Leigh, 183; *Major v. Lansley*, 2 R. & M. 355.

⁷ *McChesney v. Brown*, 25 Gratt. 393.

wife may enter into contracts with reference to her separate property in like manner, and with nearly the same effect, as a *feme sole*. Formerly it was otherwise; and for a long period the English courts of equity refused to married women having separate estate the power to contract debts.¹ But the unfairness of permitting a wife to hold and enjoy her separate property after she had incurred debts specifically upon the faith of it soon became evident, as well as the inconvenience she suffered in being unable to find credit where she meant to deal fairly. So the courts felt compelled, after a while, to admit that she might in equity charge her separate estate by a written instrument, executed with a certain degree of formality, such as a bond under her hand and seal.² One precedent in the right direction leads to another, and soon less formal instruments were brought one after another under this rule; promissory notes, bills of exchange, and lastly written instruments in general.³ Even here the court could not safely intrench itself; for the inconsistency of drawing distinctions between the different sorts of engagements of a married woman having separate estate could be readily shown; but it made a halt. The doctrine of an equitable appointment was alleged to support the new distinction.⁴ Sound reasoning at last proved too strong an antagonist; this position was abandoned; and it became at length the settled doctrine of the equity courts of England that the engagements and contracts of a married woman, whether general or relating specifically to her separate property, are to be regarded as constituting debts, and that her property so held is liable to the payment of them, whether the contract be expressed in writing or not; and all the more so if she lives

¹ *Vaughan v. Vanderstegen*, 2 Drew. 180; *Peachey Mar. Settl.* 269; *Newcomen v. Hassard*, 4 Ir. Ch. 274.

² *Biscoe v. Kennedy*, 1 Bro. C. C. 17; *Hulme v. Tenant*, 1 Bro. C. C. 16; *Norton v. Turvill*, 2 P. Wms. 144; *Tullett v. Armstrong*, 4 Beav. 323. This applies, whether the bond is executed by the wife alone, or with her husband or a stranger, apart from evidence of fraud or coercion. *Ib.*

³ See *Murray v. Barlee*, per Lord

Brougham, 3 Myl. & K. 210; *Bullpin v. Clarke*, 17 Ves. 365; *Stuart v. Lord Kirkwall*, 8 Madd. 387; *Master v. Fuller*, 1 Ves. Jr. 513; *Gaston v. Frankum*, 2 De G. & Sm. 561; s. c. on appeal, 16 Jur. 507; *Peachey Mar. Settl.* 270, and cases cited; *Tullett v. Armstrong*, 4 Beav. 323; *Owen v. Homan*, 4 H. L. Cas. 997. Taking a lease and agreeing to pay rent comes within the rule. *Gaston v. Frankum*, *supra*.

⁴ *Field v. Sowle*, 4 Russ. 112.

apart from her husband, and the debt could only be satisfied from her separate property.¹ "Inasmuch as her creditors have not the means at law of compelling payment of those debts," says Lord Cottenham, "a court of equity takes upon itself to give effect to them, not as personal liabilities, but by laying hold of the separate property as the only means by which they can be satisfied."²

But while the contract for payment of money made by a married woman having separate estate creates a debt, it is, practically considered, only a debt *sub modo* when compared with the debt of a man or an unmarried woman. It cannot be enforced against her at law; and Lord Cottenham's language indicates that it is enforceable in equity, not on the ground that she incurred a personal obligation, but because there is property upon which the obligation may be fastened. Hence it is said that there can in no case be a decree against a married woman *in personam*; the proceedings are simply against her separate property *in rem*.³ And though she is a necessary party to a suit to enforce payment against her separate estate, yet, if that estate be held in trust for her separate use, the suit must be against the trustees in whom that property is vested; the decree in such case being rendered, not against her, but against the trustees, to compel payment from her separate estate. Moreover, if the wife survive her husband, although the creditors may still enforce their demand in equity against her separate estate, yet her person and her general property remain as completely exempted from liability at law and in equity as in other cases of debts contracted by her during coverture.⁴

¹ Peachey Mar. Settl. 271, 272, and cases cited; Vaughan v. Vanderstegen, 11 Ir. Ch. 235.

² Drew. 184; Owens v. Dickenson, Craig & Phil. 48; Macq. Hus. & Wife, 303; Picard v. Hine, L. R. 5 Ch. 274. But see Newcomen v. Hassard, 4 Ir. Ch. 274; 1 Sugd. Pow. 206, 7th ed.

³ Owens v. Dickenson, Craig & Phil. 48.

⁴ Hulme v. Tenant, 1 Bro. C. C. 16; Ashton v. Aylett, 1 Myl. & Cr. 111; Macq. Hus. & Wife, 304; Peachey Mar.

Settl. 273. But see Keogh v. Cathcart, 11 Ir. Ch. 235.

⁴ Vaughan v. Vanderstegen, 2 Drew. 184; Peachey Mar. Settl. 273; Macq. Hus. & Wife, 304. But her promissory note, given during coverture so as to bind her separate estate, is a good consideration for another promissory note given after her husband's death for a balance then due, though the former note be barred by the statute of limitations. Latouche v. Latouche, 8 Hurl. & Colt. 576.

§ 242. **Liability of Separate Estate on Wife's Engagements; English Doctrine continued.** — Here, however, the fictions of equity create a new practical difficulty. For if the wife be a *feme sole* at all, with reference to her separate property, must she not have power to bind himself personally? In *Stead v. Nelson* a husband and wife undertook, for valuable consideration, by writing under their hands, to execute a mortgage of her separate estate. The husband died. Lord Langdale held that the surviving wife was bound by the agreement, and ordered a specific performance.¹ Certainly the ground of this decision must have been that the obligation was not upon her property alone, but upon her person. At the same time it is readily admitted that there are reasons of policy why the wife should be exempted from personal execution during coverture. This latter view accords with the common-law practice in analogous cases.² Perhaps, then, the more consistent view of the subject would be that the wife incurs a personal obligation, morally and legally, on such contracts, express or implied, as she may make during coverture with reference to her separate property; but that the general disabilities of coverture interpose obstacles to the enforcement of remedies by a creditor, which obstacles the courts of equity feel bound to regard; and hence that they confine the remedies to her separate estate, upon the faith of which, it may reasonably be presumed, the creditor chose to rely. And this conclusion is that preferred on the whole by the courts. For, as recent writers on the law of trusts express it, there are two conflicting principles in these equity decisions: one that the engagements of the wife are charges equivalent to so many assignments or equitable appointments to operate each in order; the other, and that now generally adopted, that the wife's contracts are not charges, but create a liability against the person, which, since the debtor is married, cannot be made available against her personally; and hence the court permits a sort of equitable execution to issue in favor of the creditor against her separate property.³

¹ 2 Beav. 245; Macq. Hus. & Wife, 304.

² Sparkes v. Bell, 8 B. & C. 1.

³ 2 Perry Trusts, §§ 655-663; Lewin Trusts, 5th Eng. ed. 542, 543. The doctrine of equitable appointment seems

§ 243. *Liability of Separate Estate on Wife's Engagement; English Doctrine continued.* — As a general rule, in England, it became settled, therefore, that wherever a married woman, having property settled to her separate use, enters into any contract by which it clearly appears that she intends to create a debt as against herself personally, it will be assumed that she intended that the money should be paid out of the only property by which she could fulfil the engagement.¹ Thus, in a case before Lord Brougham, the question came up for the first time, whether a married woman could bind her separate estate for legal expenses incurred by her, upon her retainer and promise to pay, there having been no reference to her separate estate in the agreement; and it was held that she could, and that the bill must be paid from her separate estate.² But on the other hand, in contracts where the husband is the interested party, the court will not make the wife's separate property liable, if that fact be made plain; notwithstanding she may have had some agency in the transaction.³ Nor is her separate estate liable for the expenses of litigation incurred for the children as her husband's agent.⁴

We need hardly add therefore, that, in English chancery, a married woman, having separate estate, without a clause restraining her right of disposition, may charge and encumber it in any manner she chooses, either as security for her husband's debts, her own, or those of a stranger; provided she does not appear to have been imposed upon in the transaction.⁵ And where she mortgages it, the court will regard the true nature of the transaction.⁶

A married woman may bind the corpus of her separate property by her compromise of a suit which she has instituted by her next friend.⁷ She may also contract for the purchase

to be exploded. Lord Justice Turner in *Johnson v. Gallagher*, 8 De G. F. & J. 494; *supra*, § 241.

¹ *Earl v. Ferris*, 19 Beav. 69.

² *Murray v. Barlee*, 3 Myl. & K. 209. And see *Waugh v. Waddell*, 16 Beav. 521; *Bolden v. Nicholay*, 8 Jur. n. s. 884.

³ *Tullett v. Armstrong*, 4 Beav. 319.

⁴ *In re Pugh*, 17 Beav. 336.

⁵ *Clerk v. Laurie*, 2 Hurl. & Nor. 199; *Peachey Mar. Settl.* 292. See *Horner v. Wheelwright*, 2 Jur. n. s. 367. The same rule applied in the United States. See *post*, § 246; *Short v. Battle*, 52 Ala. 456; *Armstrong v. Ross*, 5 C. E. Green, 109.

⁶ *Gray v. Dowman*, 6 W. R. 571.

⁷ *Wilton v. Hill*, 25 L. J. Eq. 156.

of an estate, and, even though the contract makes no reference to her separate property, it will be bound by her agreement.¹ So her contract to sell or mortgage her life interest in her separate estate will be specifically enforced against her.² Both she and her husband must be parties to a suit concerning her separate property,³ and it is all the more requisite that the husband be joined as a party defendant where he claims an interest or any of his acts are called in question.⁴ And it is held that the husband, by making her a party in respect to her separate estate, admits it to be such.⁵

§ 244. *Liability of Separate Estate on Wife's Engagement; Latest English Modifications.* — But in the latest English decisions a new turn — and that towards the better protection of wives having separate property against their own imprudent disposition thereof — is indicated, which we may attribute in some measure to the late legislative changes concerning married women's rights, agitated on both sides of the ocean, and the influence of contemporaneous American equity decisions evoked by the prior legislation of our respective States upon the subject. In *Johnson v. Gallagher*, decided in 1861 by the English Court of Appeal in Chancery, the court checked the loose disposition to fastening liabilities of a married woman, no matter how improvidently incurred, upon her separate estate, on the mere faith of an implied engagement.⁶ A married woman living apart from her husband, and having separate estate, carried on a trade; and, after her husband's death, tradesmen who had supplied her with goods for such trade filed a bill against her and her trustee to obtain an account of her separate estate and payment of it for their demands. She, pending the suit, mortgaged this separate estate, for valuable consideration, to an extent exceeding its

¹ *Dowling v. Maguire*, Lloyd & Goold, temp. Plunket, 1; *Crofts v. Middleton*, 2 Kay & Johns. 194, reversed on appeal.

² *Wainwright v. Hardisty*, 2 Beav. 362.

³ *Holmes v. Penney*, 3 Kay & Johns. 91. And see *Peachey Mar. Settl.* 293-296, and cases cited; *Macq. Hus. & Wife*, 297.

⁴ See *Clarkson v. De Peyster*, 3 Paige, 386; *Stuart v. Kissam*, 2 Barb. 493; *Bradley v. Emerson*, 7 Vt. 369; *Wilson v. Wilson*, 6 Ired. Eq. 236.

⁵ *Earl v. Ferris*, 19 Beav. 69.

⁶ *Johnson v. Gallagher*, 8 De G. F. & J. 494. And see the prior English cases very fully cited in the opinion of Lord Justice Turner.

value and probably so as to evade their demands. The court sustained her against the creditors; and Lord Justice Turner, after a very ample range of the whole learning upon the subject of charging a married woman's estate in equity, in the course of which he admitted that English precedent to this point had settled that the wife's separate estate must be held liable for her general engagements,¹ concluded that to such a doctrine there were limitations. He was not prepared, he observed, to go the length of saying that the separate estate would, in all cases, be affected by a mere general engagement; but to affect it there must be something more than the mere obligation which the law would create in the case of a single woman; and what that something more might be must depend in each case upon circumstances. "According to the best opinion which I can form of a question of so much difficulty," he added, "I think that, in order to bind the separate estate by a general engagement, it should appear that the engagement was made with reference to, and upon the faith or credit of, that estate, and that whether it was so or not is a question to be judged of by this court upon all the circumstances of the case."²

§ 245. **Liability in England; Engagements not Beneficial.**—These remarks of Lord Justice Turner, in the foregoing case, have been commended in still later English decisions, and by text-writers of authority.³ It would still appear that in England a married woman may, upon her separate credit, not only give her banker a lien for her overdrafts,⁴ but employ a solicitor, or a surveyor, or a builder, or a tradesman, or hire laborers or servants, all on the credit or for the immediate

¹ "The weight of authority, therefore, seems to me to be in favor of the liability. I think, too, that the principle on which all the cases proceed that a married woman, in respect of her separate estate, is to be considered as a *feme sole*, is also in favor of it, and upon the whole, therefore, I have come to the conclusion that not only the bonds, bills, and promissory notes of married women, but also their general engagements, may affect their separate estates, except as the Statute of Frauds may

interfere where the separate property is real estate." *Johnson v. Gallagher*, 3 De G. F. & J. 494, 514.

² *Johnson v. Gallagher*, 3 De G. F. & J. 494, 514.

³ *London Bank of Australia v. Lempriere*, L. R. 4 P. C. 572, 594, approves as stated in the text; also *Butler v. Cumpston*, L. R. 7 Eq. 20, 21; *Mathewman's Case*, L. R. 3 Eq. 781; *Lewin Trusts*, 5th Eng. ed. 546.

⁴ *London Bank of Australia v. Lempriere*, L. R. 4 P. C. 572, 594.

benefit of her separate property ;¹ that her corporation shares are liable to assessment.² Where a married woman contracts any such debt which she can only satisfy out of her separate estate, her separate estate will, in equity, be made liable to the debt.³ Doubt is thrown upon the extent of the binding force of engagements not for the wife's benefit ; and, on the whole, the test in chancery seems to be settling, at the present day, towards regarding whether the transaction out of which the demand arose had reference to, or was for the benefit of, the wife's separate estate ; and, on the whole, unsatisfactory as may be this abstruse discussion, circumstances are likely to determine the decision of each case, with perhaps a growing partiality in favor of a married woman's rights, and a growing indisposition to make her suffer.

§ 246. *American Doctrine as to Wife's Disposition of Equitable Estate.* — In this country, whenever the wife's separate use has been admitted as a doctrine of equity, independently of statute, her right of dominion has also been recognized. The celebrated New York case of *Jaques v. Methodist Episcopal Church*, which may justly be placed foremost among the very few important American chancery decisions of this class, established that a *feme covert*, with respect to her separate estate, and especially her personal property, was to be regarded in equity as a *feme sole*, so that she might dispose of it at pleasure, except so far as expressly denied or restrained by the terms of the instrument which created the

¹ See Lord Justice James, in *London Bank of Australia v. Lempriere*, *supra* ; Lord Justice Turner, in *Johnson v. Gallagher*, 8 De G. F. & J., 494.

² *Matthewman's Case*, L. R. 8 Eq. 787. Kindersley, V. C., rules in this case that if a married woman, having separate property, enters into a pecuniary engagement, whether by ordering goods or otherwise, which, if she were a *feme sole*, would constitute her a debtor, and in entering into such engagement she purports to contract, not for her husband, but for herself, and on the credit of her separate estate, and it was so intended by her, and so under-

stood by the person with whom she is contracting, that constitutes an obligation for which the person with whom she contracts has the right to make her separate estate liable ; and the question whether the obligation was contracted in this manner must depend upon the facts and circumstances of each case.

³ *Picard v. Hine*, L. R. 5 Ch. App. 274.

The wife cannot be adjudicated a bankrupt in respect of debts incurred during marriage, even though having separate property. *Ex parte Jones*, 40 L. T. 790.

trust.¹ Numerous American cases also rule, conformably with English precedents, that a married woman may, by her contracts or engagements, bind her separate property, it being sufficient that there was an intention to charge her separate estate; and further, that by contracting a debt during coverture she furnishes a presumption of that intention, since otherwise her contract must have been worthless to her creditor.² In general, however, it is to be observed that the American equity doctrine of the wife's power to charge her separate estate, independently of the married women's acts, has fluctuated somewhat, as have likewise the English cases, and that not only do American courts find difficulty, like those of England, in encountering cases where the liability incurred was disadvantageous to the wife, and at the same time not clearly charged by her on her separate property; but this further source of perplexity appears moreover, namely, that local legislation, in these later years, places the rights of married women on quite a novel footing. Some States favor a stricter rule; in few States, indeed, did the subject receive much development prior to the second half of this century; while the policy of the married women's acts themselves, in most jurisdictions, must be opposed to making such legislation disadvantageous to her interests. Hence a course of precedents, of later years, hardly less abstruse and irreconcilable than those of the English chancery, but somewhat independent of them. This doctrine may better be studied at length in our next chapter, in connection with legislative changes affecting the wife's right of disposition in this country. To this extent, however, American courts occupy sure and uniform ground, namely, that while a married woman may not be bound personally by her contract, the rule under the

¹ *Jaques v. Methodist Episcopal Church*, 17 Johns. 548; *Methodist Episcopal Church v. Jaques*, 1 Johns. Ch. 450; 3 *ib.* 77; 2 Kent Com. 164; *McChesney v. Brown*, 25 Gratt. 898; *Patton v. Charlestown Bank*, 12 W. Va. 587; *Wells v. Thorman*, 37 Conn. 319; *Leaycraft v. Hedden*, 3 Green Ch. 512; *Newlin v. Freeman*, 4 Ired. Eq. 812; *Fears v. Brooks*, 12 Ga. 200; *Bradford v. Greenway*, 17 Ala. 806; *Shipp v. Bowmar*, 5 B. Mon. 163; *Kirwin v. Weippert*, 46 Mo. 532.

² 2 Kent Com. 164, and cases cited; *Fire Ins. Co. v. Bay*, 4 Comst. 9; *Vanderheyden v. Mallory*, 1 Comst. 452; 2 U. S. Eq. Dig. Hus. & Wife, 19; *Dallas v. Heard*, 32 Ga. 604; *Withers v. Sparrow*, 66 N. C. 129.

statutes and independently of them¹ is, that when services are rendered her by her procurement, or she contracts a debt generally, on the credit and for the benefit of her separate estate, there is an implied agreement and obligation springing from the nature of the consideration, which the courts will enforce by charging the amount on her separate property as an equitable lien.²

In American chancery courts, in fact, the charging of the wife's separate estate by equity proceedings is presented with reference sometimes to her equitable, and sometimes to her statutory, separate estate. In some States the complete jurisdiction of trusts for separate use is the creature of recent statute;³ in others, the rule is deliberately admitted, in chancery, to differ as to statutory and equitable separate estate;⁴ in others, once more, chancery seeks, and with true consistency, to apply one and the same principle where it takes jurisdiction of separate estate at all. The discrepancy of all these modern American authorities relates chiefly (1) to determining the liability of the wife's equitable or statutory separate estate for debts and engagements not beneficial to the wife herself, or to the estate, but, if at all, for her husband's or a stranger's benefit, and (2) to fixing the nature of the evidence of intention required for such charges. The equitable rule in the United States, more common prior to the married women's acts, appears to have been, that the wife's separate estate would be held liable for all debts which she, by implication or expressly, by writing or by parol, charged thereon, even if not contracted directly for the benefit of the estate.⁵ But such is by no means the rule to-day.

§ 247. **Property with Power of Appointment** — Property limited to such uses as a married woman shall appoint is not separate estate. There is a difference between property sub-

¹ *Wilson v. Jones*, 46 Md. 349; *Cozens v. Whitney*, 3 R. I. 79; *Harshberger v. Alger*, 31 Gratt. 52.

² *Owen v. Cawley*, 36 N. Y. 600; *Ballin v. Dillaye*, 37 N. Y. 85; *Armstrong v. Ross*, 5 C. E. Green, 109; *Buckner v. Davis*, 29 Ark. 444; *Dale v. Robinson*, 51 Vt. 20; *Elliott v. Gower*, 12 R. I. 79.

³ See *Hoar, J.*, in *Willard v. Eastham*, 15 Gray, 328.

⁴ *Musson v. Trigg*, 51 Miss. 172; *Robinson v. O'Neal*, 53 Ala. 541.

⁵ 2 Kent Com. 164; 2 Story Eq. Juris. §§ 1398, 1401, and cases cited; *Ballin v. Dillaye*, 37 N. Y. 85.

ject merely to her power of appointment, and property settled to her sole and separate use. In the former instance she may dispose of the estate by executing an instrument according to the strict letter of her authority. In the latter, she is invested with a beneficial interest and enjoyment, however restricted may be the dominion allowed her by the donee. A power of appointment is much the same as any other special power, and on such a principle, not upon the ground that she is a *feme sole* as to the property, the courts both of equity and of law recognize her right to execute without joining her husband. And indeed in some cases, under her trust, she may pass the absolute property in a chattel by gift and manual delivery without writing at all, because she has been so empowered. She cannot, by virtue of a mere power of appointment as to a certain fund, charge the property with her debts or affect it by her general contracts, any more than she can other property which is not hers.¹ On the other hand, the wife's disposition of her separate estate does not arise from the exercise of a power, but it is the exercise of a dominion over that estate, unknown to the common law and created by a court of equity, whose rules provide not only for her dominion over it, but also for the rights of those in favor of whom that dominion shall be exercised.² A power of appointment given to a married woman, and a trust for her separate use, are then perfectly distinct, even when they affect succeeding interests in the same property.

A married woman may, however, be expressly authorized to appoint by will and not by deed, and the exercise of such power in favor of volunteers may render the appointed funds assets for the satisfaction of debts properly chargeable against her separate estate.³ In general, equity permits a married woman to dispose of property according to the mode, if any, prescribed by the instrument under which the separate use is created.⁴ And it is held by the English chancery that if a

¹ *Vaughan v. Vanderstegen*, 2 Drew. 378. See *Farrington v. Parker*, L. R. 4 Eq. 116. *Bamford*, 1 Ph. 620; *Shattock v. Shattock*, L. R. 2 Eq. 182; *Hanchett v. Briscoe*, 22 Beav. 496.

² *Digby v. Irvine*, 6 Ir. Ch. 149. See ³ *Re Harvey*, 28 W. R. 73.

Peachey Mar. Sett. 276; *Brown v.* ⁴ *McChesney v. Brown*, 25 Gratt.

power be given to a married woman to be exercised in relation to the separate fund, an absolute interest therein being given her in default of the exercise of the power, she may decline to exercise the power, and thereby acquire the right to sell it as a single woman.¹

§ 248. *Right of Wife to bestow upon her Husband; English Rule.* — A married woman, save so far as she is restrained from anticipation by the terms of the trust, may bestow her separate property upon her husband by virtue of her right of disposal; although at common law no such thing is known as a gift between husband and wife. She may likewise transfer it to him for a valuable consideration.² But acts of this sort are very closely scrutinized; and undue influence on the part of the husband, or the fraud of both husband and wife upon creditors of either, will often explain the motive of such transactions, and suffice for setting them aside in equity.³ The fact that the husband receives the capital of his wife's separate property raises the inference, not of a beneficial transfer to him, but of a transfer to him as her trustee.⁴ A gift to him requires clear evidence, such as acts of dominion, or the use of the property for his business or to execute his marital obligations.⁵

When the wife has made a gift to her husband, she will be precluded, after his death, from charging his estate with what he so received.⁶ If she allows him to use her separate property, without making a claim to it, or permits him to receive her separate income and apply it to the wants of the family, she will in general be presumed to have assented to the arrangement.⁷ But if the circumstances do not warrant the inference that the wife has assented to, or acquiesced in, the husband's receiving her income, or in his mode of applying it,

393; *Knowles v. Knowles*, 86 Ill. 1; *Jaques v. Methodist Episcopal Church*, 17 Johns. 548. And see *post*.

¹ *Barrymore v. Ellis*, 8 Sim. 1; 1 Bro. Ch. 582.

² *Lyn v. Ashton*, 1 Russ. & M. 190; *Macq. Hus. & Wife*, 297.

³ *Pybus v. Smith*, 1 Ves. 189.

⁴ *Rich v. Cockell*, 9 Ves. 389; *Richardson v. Stodder*, 100 Mass. 528.

⁵ *Shirley v. Shirley*, 9 Paige, 363; *Rowe v. Rowe*, 12 Jur. 909.

⁶ *Paulet v. Delavel*, 2 Ves. Sen. 663; 2 Roper *Hus. & Wife*, 220; 1 Madd. Ch. 472.

⁷ *Square v. Dean*, 4 Bro. C. C. 326; *Beresford v. Archbishop of Armagh*, 18 Sim. 643; *Bartlett v. Gillard*, 3 Russ. 149; *Carter v. Anderson*, 3 Sim. 370.

she will be entitled to reimbursement out of his estate.¹ So long as her transfer of separate property to her husband remains incomplete, she can revoke her consent to the gift.² While the property continues to be for her sole and separate use, she is entitled to the same protection against her husband's interference that a single woman would have against a stranger, and this right passes to her assignee under any assignment excluding her husband's dominion which she may have rightfully made.³ And where a wife joins her husband in encumbering her separate estate partly for his benefit and partly for her own, it will not readily be presumed that she designed to give the whole of the proceeds to him; for which reason the trustee employed by them should not treat the money as that of the husband alone.⁴

The wife's bond, executed to her husband, has accordingly been sustained in the English chancery.⁵

§ 249. *Wife's Right to bestow, &c., upon Husband; American Rule.*—In the exercise of her right of dominion, the wife may also, in American chancery, unless specially restrained by the trust, bestow her separate property upon her husband, give him the use and income thereof, or bind it for his debts,⁶ subject to the qualifications already noticed.⁷ It is also well settled, both under the married women's acts of our respective States, and independently of them, that a married woman may execute a mortgage jointly with her husband to secure his debts, in which case she is to be regarded as his surety; and this applies to lands held in her right, whether conveyed to her separate use or not, provided the conveyance be executed by husband and wife jointly after the usual manner of such instruments under the statute, and no duress was imposed upon her.⁸ And she may pledge her separate

¹ *Parker v. Brooke*, 9 Ves. 588; *Iam v. Walpole*, Pet. C. C. 116; *Charles Macq. Hus. & Wife*, 298; *Dixon v. v. Coker*, 2 S. C. n. s. 123. The husband may be purchaser at a sale properly made under order of chancery, though the trustee of his wife. *Norman v. Norman*, 6 Bush, 496.

² *Penfold v. Mould*, L. R. 4 Eq. 562.

³ *Allen v. Walker*, L. R. 5 Ex. 187.

⁴ *Jones v. Cuthbertson*, L. R. 7 Q. B. 218.

⁵ *Heatley v. Thomas*, 15 Ves. 596.

⁶ 2 Kent Com. 111, and cases cited; 2 U. S. Eq. Dig. *Hus. & Wife*, 18; *Dal-*

⁷ *Supra*, §§ 243, 246, 248.

⁸ *Demarest v. Wynkoop*, 8 Johns.

Ch. 129; *Van Horne v. Everson*, 13

Barb. 526; *Vartie v. Underwood*, 18

Barb. 561; *Bartlett v. Bartlett*, 4 Al-

personal property as security in like manner.¹ And her separate estate will be bound by any debt properly contracted by her, even though her husband should be the creditor.² A gift or conveyance by a wife to her husband, if fraudulently or forcibly procured by him, will be set aside in equity upon her representation; so, too, where it was intended for his security, but taken out as absolute;³ but if the rights of a *bona fide* purchaser without notice of the fraud or force have intervened, her own rights may be impeded in the latter's favor.⁴

§ 250. **Concurrence of Trustees in Wife's Disposition not Essential.** — Consistently with the wife's right of dominion over her separate estate, the rule, both in English and American chancery courts, is, that the concurrence of the trustee of the fund is not essential to the validity of her disposition thereof.⁵ On the contrary, if she has the absolute beneficial enjoyment of the fund by the terms of the trust (there being no clause in restriction of her power), or in such manner, if it be real estate, that the statute of uses would execute the title or use in her, she can compel the trustee to make immediate conveyance or transfer to her of the trust fund, and if they refuse they are liable to costs.⁶ Even if the gift be to her husband or for his benefit, the trustee must transfer and give legal effect to the alienation, as in other instances of disposition on her part, reserving, of course, the right to show bad faith or undue influence affecting the validity of the transfer or conveyance, and so defeating it.⁷

len, 440; *Short v. Battle*, 52 Ala. 456; *Young v. Graff*, 28 Ill. 20; *Watson v. Thurber*, 11 Mich. 457; *Eaton v. Nason*, 47 Me. 182; *Spear v. Ward*, 20 Cal. 659; *Ellis v. Kenyon*, 25 Ind. 134; *Green v. Scranage*, 19 Iowa, 461; *Wolff v. Van Meter*, 19 Iowa, 194. A power to mortgage, reserved in a trust which settles land to the wife's separate use, will support a mortgage to secure the husband's debt. *New York statutes* permit it. *Leavitt v. Peel*, 25 N. Y. 474.

The method of conveying the wife's general lands under our modern local statutes is shown *supra*, §§ 176-180.

¹ *Witsell v. Charleston*, 7 S. C. 88.

² *Gardner v. Gardner*, 7 Paige, 112.

³ *Stumpf v. Stumpf*, 7 Mo. App. 272; *Fargo v. Goodspeed*, 87 Ill. 290.

⁴ *O'Hara v. Alexander*, 56 Miss. 316.

⁵ *Essex v. Atkins*, 14 Ves. 552; *Corge v. Dunton*, 7 Penn. St. 532; *Jaques v. Methodist Episcopal Church*, 17 Johns. 548.

⁶ *Clerk v. Laurie*, 2 Hurl. & Nor. 199; *Peachey Mar. Settl.* 292; 2 *Perry Trusts*, § 667; *Taylor v. Glanville*, 8 Mad. 179; *North American Coal Co. v. Dyett*, 7 Paige, 1; *Gibson v. Walker*, 20 N. Y. 476. And see *Lewis v. Harris*, 4 Met. (Ky.) 363. But see *Noyes v. Blake-man*, 2 Seld. 567; s. c. 3 Sandf. 531, as to the effect of New York statute relative to the declaration of trusts.

⁷ *Essex v. Atkins*, 14 Ves. 542; *Mar-*

But if, on the other hand, the instrument requires the written approval of the trustee expressed in a certain manner, that requirement must be complied with to make even the joint conveyance of husband and wife effectual;¹ and it is incumbent on every trustee to see that all restrictions on the wife's dominion over the fund are duly respected.²

§ 251. **Whether Wife must be specially restrained under the Trust to preclude her Dominion.**—The clause of anticipation, which is such a favorite in English chancery, under instruments drawn for the creation of a separate use, is seldom applied in American cases;³ but in absence of all such technical clauses, our general rule is that the wife, unless specially restrained by the terms of the trust under which she acquired her equitable separate property, may dispose of it at pleasure. *Jaques v. Methodist Episcopal Church* went so far as to rule that, though a particular mode of disposition be specifically pointed out in the instrument, this will not preclude the wife from adopting any other mode of disposition unless she has been, by express language of the trust, specially restrained to that particular mode.⁴ In this latter doctrine Chancellor Kent (whose judgment in the lower court had been reversed⁵) did not concur,—adopting the more

rick v. Grice, 3 Nev. 52; *Standford v. Marshall*, 2 Atk. 69; *Knowles v. Knowles*, 86 Ill. 1.

¹ *Gelston v. Frazier*, 26 Md. 329. See, as to lapse of time, *Frazier v. Gelston*, 35 Md. 298.

² *Hopkins v. Myall*, 2 R. & M. 86; *McClintic v. Ochiltree*, 4 W. Va. 249. Under strong circumstances of equity, and in order to the convenient enjoyment of her separate property, equity will allow the wife to enter into the personal enjoyment of rents and profits. *Horner v. Wheelwright*, 2 Jur. n. s. 367.

³ *Supra*, §§ 202, 287.

⁴ *Jaques v. Methodist Episcopal Church*, 17 Johns. 548; *Methodist Episcopal Church v. Jaques*, 1 Johns. Ch. 450; 3 *ib.* 77.

⁵ 3 Johns. Ch. 77. The point contended for by the Chancellor, but dis-

approved on appeal, was, that if a wife has power expressly conferred to dispose by deed in concurrence with her husband, or by will without it, her receipt "alone" to be a sufficient discharge as to rents, issues, and profits; the wife cannot appoint by deed, or charge the property by her sole bond, note, parol promise, &c.

Hoar, J., in *Willard v. Eastham*, 15 Gray, 328, observes, by way of *dictum*, that "the general current of American authorities supports the principle that a married woman has no power in relation to her separate estate but such as is expressly conferred in the creation of the estate; and that her separate estate is not chargeable with her debts or obligations, unless where a provision for that purpose is contained in the instrument creating the separate estate." If by this is meant that the wife's power of

conservative view with reference to such restrictions. The distinction is rather a nice one, and successive American decisions in other States have generally sustained the Chancellor's views, which seem indeed most consonant to reason and the intent of such trusts; but the cases are, on the whole, conflicting, and not very conclusive.¹

Both English and American precedents agree in the converse principle, that if, by the terms of the trust, the wife is expressly restrained to a particular mode of dealing with the separate fund, she cannot, even by proceedings in equity, be enabled to pursue any other inconsistent mode.²

§ 252. *Separate Estate affected by Wife's Participation in Breach of Trust; Husband's Misconduct considered.* — The separate estate of married women may be affected, and their rights barred, by active participation in breaches of trust.³ But on the other hand, to preclude the wife from the right to relief simply because she has improperly permitted her husband to receive the trust funds, would be to defeat the very purpose for which the trust was created, — namely, the protection of the wife against her husband. Hence, according to the latest and best authorities, the court must be satisfied that the husband has not in any degree influenced her acts and conduct, before it holds her separate estate to

disposition must be expressly conferred in order to operate, the statement appears very far from accurate, and is by no means what Chancellor Kent contended for in the above case. In 2 Perry Trusts, §§ 655-663, the same idea is expressed, probably upon the authority of the Massachusetts court.

¹ See *Tullett v. Armstrong*, 1 Beav. 1, at length, for the English doctrine. For American authorities, see 2 Kent Com. 165, 168, and cases cited in last edition; also the following which appear to favor Chancellor Kent's rule: *Shipp v. Bowmar*, 5 B. Monr. 168; *Tarr v. Williams*, 4 Md. Ch. 68; *Nix v. Bradley*, 6 Rich. Eq. 53; *Wylly v. Collins*, 9 Geo. 233; *Doty v. Mitchell*, 9 Sm. & M. 485; *Morgan v. Elam*, 4 Yerg. 375; *McClintic v. Ochiltree*, 4 W. Va. 249; *Lancaster v. Dolan*, 1 Rawle, 231; *Sher-*

man v. Turpin, 7 Cold. 382; *Metcalf v. Cook*, 2 R. I. 355; *Porcher v. Reid*, 12 Rich. Eq. 349; *Harris v. Harris*, 7 Ired. Eq. 111; *Hume v. Hord*, 5 Gratt. 374; *Hicks v. Johnston*, 24 Geo. 194; *Andrews v. Jones*, 32 Miss. 274; *Leaycraft v. Hedden*, 3 Green Ch. 512; *Penn. Co. v. Foster*, 35 Penn. St. 134; *Chew v. Beall*, 13 Md. 348. But *Kimm v. Weippert*, 46 Mo. 582; 14 Ohio St. 519, bear in favor of the more liberal rule of the New York appellate court. As to a deed which limits the wife's power to mortgage, see *Maurer's Appeal*, 86 Penn. St. 880.

² *Ross v. Ewer*, 2 Atk. 156; *supra*, §§ 237, 238, 247; 2 Perry Trusts, § 655.

³ *Peachey Mar. Sett.* 276; *Ryder v. Bickerton*, 8 Swanst. 80, n.; *Lord Montford v. Lord Cadogan*, 19 Ves. 635.

be affected; and this upon the most jealous investigation.¹ For the wife to stand by in silence while the husband represents himself as owner of what really is the wife's separate property, by way of inducing credit, will not necessarily charge that estate.² If the instrument contains no clause against anticipation, and the wife misapplies part of the trust property, her other interests under the same instrument may be held to make good the loss.³

Where her husband and the trustee of the fund, by way of fraudulent collusion to deprive her of her property, make an improper transfer thereof out of her separate use, her assent will not be readily presumed to the transaction from circumstances, while she remained in ignorance of it.⁴

§ 253. **Wife cannot bind herself to convey; Specific Performance refused.** — A married woman, one of several devisees in trust for sale, cannot bind herself to convey; and upon such a contract on her part specific performance will not be enforced against her.⁵ Nor can a married woman consent to some future loan to her husband so as to be compelled to execute, but her consent must go with the act;⁶ nor bind herself by an executory contract for the sale of her real estate.⁷

§ 254. **Income from Separate Estate to the Husband; One Year's Arrears.** — By the ordinary rule of the English chancery courts a wife is precluded from recovering the arrears of income on her separate estate for more than a year, upon the ground of a supposed gift to her husband.⁸ As to whether one year's income can be recovered or not there is much dis-

¹ Per Sir Geo. Turner, *Hughes v. Wells*, 9 Hare, 773. And see authorities, *supra*; *Kellaway v. Johnson*, 5 Beav. 819; *Cocker v. Quayle*, 1 Russ. & M. 535; *Fargo v. Goodspeed*, 87 Ill. 290; *Brewer v. Swirles*, 2 Sm. & Gif. 219. *Contra*, *Whistler v. Newman*, 4 Ves. 129, doubted in *Parke v. White*, 11 Ves. 228.

² *Carpenter v. Carpenter*, 27 N. J. Eq. 502.

³ *Clive v. Carew*, 1 John. & Hem. 199.

⁴ *Dixon v. Dixon*, L. R. 9 Ch. D. 587.

⁵ *Avery v. Griffin*, L. R. 6 Eq. 696.

⁶ *Taylor v. Taylor*, 4 Jur. n. s. 1218.

⁷ *Miller v. Albertson*, 73 Ind. 843.

⁸ *Peachey Mar. Settl.* 291, and cases cited; *Rowley v. Unwin*, 2 Kay & Johns. 142; *Arthur v. Arthur*, 11 Ir. Ch. 513. And see *Dalbiac v. Dalbiac*, 16 Ves. 116; *Parker v. Brooke*, 9 Ves. 588; *Caton v. Rideout*, 1 Mac. & Gord. 599; *Beresford v. Archbishop of Armagh*, 18 Sim. 643; *Howard v. Digby*, 2 Cl. & Fin. 634.

crepancy in the English cases; but the better opinion, even here, is, that the husband has been allowed by the wife presumably to receive and appropriate her income from year to year, unless, by a consistent course of dissent, the wife, on her part, rebuts such presumption, in which case her will must be respected. If the wife is insane and incapable of assenting, or the income has not actually come to her husband's hands, and under the trust, moreover, the income is not payable to the husband, the income will belong to her; though here the inclination of equity is to allow reasonable offsets to the husband.¹

CHAPTER V.

THE WIFE'S DOMINION OVER HER STATUTORY SEPARATE PROPERTY.

§ 255. **Dominion under Married Women's Acts in General.** — The doctrine of the wife's dominion over her separate estate is at this day more generally asserted, in the United States at least, with reference to the married women's acts; and some of the later cases show important variations from the equity rule, as we shall proceed to notice. The decided change seems to date, in American chancery, from the passage of the important married women's acts, or about 1848, and in most States at this day to affect equitable remedies with reference to both the statutory and equitable separate estate of the wife.²

§ 256. **Wife's Dominion; New York Rule as to a Wife's Suretyship.** — The obstinate case of *Yale v. Dederer* is an important one, as establishing in a leading American State, under cover of modern legislative policy, a new doctrine, at variance with that of English equity courts noted in our last chapter, and apparently contrary to its own precedents.³ In this case the New York statutes of 1848 and 1849 were to be construed,

¹ *Lewin Trusts*, 550; ² *Perry Trusts*, § 665, and cases cited.

³ *Yale v. Dederer*, 18 N. Y. 265; s. c. 22 N. Y. 450.

² *Supra*, § 205.

which in terms permitted the wife to hold to separate use, and to "convey and devise" as if sole, but left her promissory note as void as it always had been at the common law. It appeared that the husband had offered his promissory note to the plaintiff in payment of certain cows which he wished to purchase; that the plaintiff, doubting his solvency, required him to procure his wife to unite in a note with him. This he did. The note was subsequently renewed. At the time of signing the note Mrs. Dederer remarked that if her husband was not able to pay it, she was. The husband turned out insolvent afterwards, and judgment on the note was returned *nulla bona* as against him. It was established that the wife had sufficient real estate, held in her own right, to satisfy the claim; and the judge, who heard the evidence, stated in his finding that "the defendant, Mrs. Dederer, intended to charge, and did expressly charge, her separate estate for the payment of the note." The Court of Appeals nevertheless held that Mrs. Dederer was a mere surety for her husband; and that being such, although it was her intention to charge her separate estate, such intention did not take effect.

A question properly raised here was whether, notwithstanding her legal disabilities to contract remained substantially as before the statute, the married woman might, as incidental to the complete right of property and *jus disponendi* which she took under the statute, charge her estate for the purposes and to the extent which rules of equity had heretofore sanctioned with reference to her equitable separate estate. The decision was adverse, and the principle of the decision was this: that, in order to create a charge upon the separate estate of a married woman, the intention to do so must be declared in the very contract which is the foundation of the charge, or else the consideration must be obtained for the direct benefit of the estate itself. Later New York decisions follow the rule of this case, and require a distinct written obligation to bind the wife where the debt is not contracted for the direct benefit of the estate.¹

¹ *White v. McNett*, 83 N. Y. 371; *Merchants' Bank v. Scott*, 59 Barb. 109; *Ledlie v. Vrooman*, 41 Barb. 109; 641.

White v. Story, 43 Barb. 124; We may add that *Yale v. Dederer*

§ 257. Rule in Other States where Wife's Charge is not Beneficial to her. — The decision in *Yale v. Dederer*, on its second appeal, made a profound impression among chancery jurists, the novelty of the married women's act favoring this result, and likewise the circumstance that chancery jurisdiction had hitherto been taken more liberally in New York than in other States in the Union. Opinions differed as to the merits of the decision, but not as to the boldness of the innovation upon chancery precedents.

It does not appear that this doctrine has found favor in all the other States. In Wisconsin, the decision of *Yale v. Dederer* was unsparingly condemned soon after, in the course of judicial discussion.¹ And for several years the more common equitable rule in this country still seemed to be that the wife's separate estate would be held liable for all debts which she by implication or expressly, by writing or parol, charged thereon, even if not contracted directly for the benefit of the estate.² For the wife's debts are charged in justice upon her

was passed upon by the New York Court of Appeals three several times. After the first appeal (18 N. Y. 266), when it was ruled that, in order for a married woman to charge her separate estate with a debt not contracted for the benefit of that estate, it was necessary that there should be evidence of an intention to charge it, the court below, which would at first have entered judgment to sell, found that the wife actually intended to charge her separate estate with the promissory note in question. Hence the principle so broadly asserted as to evidence in writing on the second appeal (22 N. Y. 450); Selden, J., observing that hereafter married women were not to be indebted to equity merely for protection in their separate estate, and that, discarding the fictitious theories of the English courts, there was no reason why the wife's acts in this respect should not be tested by the same principles and rules of evidence as apply to similar questions in other cases. A third time (see 68 N. Y. 329), or about

1877, the case went up on appeal; the effort upon the last trial being made to take the case out of the rule by evidence tending to show that the property was purchased by the husband as agent of the defendant, and for the benefit of her separate estate; but it was held that the findings as to the circumstances and intent were not inconsistent with the idea that the defendant had signed as surety, and that the purchase was not for the benefit of her separate estate.

¹ *Todd v. Lee*, 15 Wis. 365.

² *Pentz v. Simonson*, 2 Beas. 222; *Grapengether v. Fejervary*, 9 Iowa, 163; *Rogers v. Ward*, 8 Allen, 387; *Mayo v. Hutchinson*, 57 Me. 546; *Major v. Symmes*, 19 Ind. 117; *Oakley v. Pound*, 1 McCart. 178; *Miller v. Newton*, 23 Cal. 554; 2 Kent Com. 164; 2 Story Eq. Juris. §§ 1398, 1401. See *Koontz v. Nabb*, 16 Md. 549; *Knox v. Jordan*, 5 Jones Eq. 175; *McFaddin v. Crumpler*, 20 Tex. 374; *Phillips v. Graves*, 20 Ohio St. 371; *Avery v. Vansickle*, 35 Ohio St. 270.

separate estate, not because of her power to make a valid written or verbal contract, but because it is right that her debts should be paid.¹

But influences were at work to bring other jurisdictions to reject the loose discretionary powers which English precedents appeared to have established against, as well as favorably to, the interests of married women. In Massachusetts, at a term of 1860, the Supreme Court, called for the first time to exercise full equity powers under a statute then recent, followed the rule of *Yale v. Dederer*, in a similar case of married women's suretyship.² The English chancery itself, finding occasion in 1861 to consider the subject of separate estate liability for a wife's unbeneficial dealings,³ showed a new inclination to discriminate for the protection of a wife's separate estate in such instances. On the whole, therefore, while the lines of American and English decisions of late do not run parallel, and States themselves are discordant as to burden of proof and as to admitting or denying the New York and Massachusetts doctrine, — some States holding it immaterial in equity whether the wife's debt be evidenced by a written instrument or parol promise,⁴ — the tendency on both sides of the water is towards the conclusion that the debts of a married woman having separate property are only to be surely charged by a court of equity upon that separate property, and payment enforced out of it, when it was contracted by her for its benefit, or expressly made a charge thereon or expressly contracted on its credit;⁵ and, of course,

¹ *Cummins v. Sharpe*, 21 Ind. 331; *Pentz v. Simonson*, 2 Beas. 232; *Glass v. Warwick*, 40 Penn. St. 140. But see *Macley v. Love*, 25 Cal. 387; *Hanly v. Downing*, 4 Met. (Ky.) 95.

² *Willard v. Eastham*, 15 Gray, 328. The volume of Reports containing this opinion was not, however, published before 1869.

³ That is, for buying stock in trade for her separate business. This case was *Johnson v. Gallagher*, 8 De G. F. & J. 494; *supra*, § 244.

⁴ *Miller v. Brown*, 47 Mis. 505.

⁵ See *supra*, § 245; *Armstrong v.*

Ross, 5 C. E. Green, 109; *Kantrowitz v. Prather*, 31 Ind. 92; *Hashengan v. Specker*, 36 Ind. 413; *Perkins v. Elliott*, 7 C. E. Green, 127; *Patrick v. Littell*, 36 Ohio St. 79, and authorities cited; *Westgate v. Munroe*, 100 Mass. 227; *Nash v. Mitchell*, 71 N. Y. 199; *Wilson v. Jones*, 46 Md. 349; *Wallace v. Finberg*, 46 Tex. 35; *Williams v. Hugunin*, 69 Ill. 214; *Stilwell v. Adams*, 29 Ark. 346; *Pippen v. Wesson*, 74 N. C. 437.

The doctrine of *Yale v. Dederer*, whether by statute or judicial decision, finds more direct support from *Cozzens v. Whitney*, 3 R. I. 79; *Jones v. Cro-*

to the extent only to which the wife's power of disposal may go.¹

§ 258. *Modern Instances; Charging the Wife's Separate Property.*—Now, to apply the test of incurring debt upon the credit or for the benefit of a wife's separate estate to the latest American decisions, and with more or less reference to local statute. A married woman's written agreement to pay for services rendered in procuring a loan to discharge a mortgage upon her separate estate is held, in Ohio, enforceable against her separate estate.² So, of course, the wife's mortgage of real estate, duly executed with her husband according to law, or her other conveyance.³ So, in New York, a guaranty executed by the wife and her husband on the transfer of her mortgage, to extricate the title, and as part of the consideration, an intention to charge or for direct benefit duly appearing.⁴ So, under later New York statutes, liability for a deficiency found under a mortgage foreclosure, a bond and mortgage having been duly executed.⁵ So, in various States, the wife's bond or note to secure the price of land conveyed to her sole and separate use.⁶ Or a judgment confessed as part of the agreement under which the wife takes land.⁷ For it is but a fair assumption that a loan raised on security of a woman's real estate under sealed instrument is for the benefit of such estate. A promissory note whose consideration enures to the benefit of the wife's separate estate, or was given upon its express credit, is thus enforceable.⁸

So the wife's estate may be bound by her indorsement of a

thwaite, 17 Iowa, 398; *Perkins v. Elliott*, 7 C. E. Green, 127; *Maguire v. Maguire*, 3 Mo. App. 468; *Hodson v. Davis*, 43 Ind. 258; *Chatterton v. Young*, 2 Tenn. Ch. 768; *Nelson v. Miller*, 52 Miss. 410. But other cases are to the contrary. *Metropolitan Bank v. Taylor*, 62 Mo. 338; *Mayo v. Hutchinson*, 57 Me. 546; *supra*, p. 802. The rule is regarded as settled in New York, that, in order to charge the estate of a married woman with a debt not contracted for the benefit of her separate estate, the intent to charge such estate, where the obligation is in writing, must be expressed in

the instrument. *Yale v. Dederer*, 68 N. Y. 329.

¹ See *Hix v. Gosling*, 1 Lea, 560.

² *Patrick v. Littell*, 36 Ohio St. 79.

³ *Supra*, §§ 243, 249.

⁴ *White v. McNott*, 33 N. Y. 371.

⁵ *Ballin v. Dillaye*, 37 N. Y. 35.

⁶ *Rogers v. Ward*, 8 Allen, 387; *Chapman v. Foster*, 6 Allen, 130; *Garland v. Pamplin*, 32 Gratt. 305; *First Nat. Bank v. Haire*, 36 Iowa, 443.

⁷ *Quinn's Appeal*, 86 Penn. St. 41.

⁸ See *Wright v. Dresser*, 110 Mass. 51; *Quassaic Nat. Bank v. Waddell*, 3 Thomp. & C. 680.

note with suitable extension of the instrument.¹ Her note given for purchase of a sewing-machine.²

The purchase of a piano as her separate property, and a note given therefor, is held, in Ohio, enforceable against the wife's separate estate; an intention to charge being inferable from execution of the note.³ And where the wife acquires title to property by purchase (which by force of statute becomes her separate property) and executes a promissory note, the implication is that she intended to charge her separate estate with its payment.⁴

In Massachusetts it is deemed that the intent and the facts on which it rests are not affected by the giving of collateral security. Hence payment may be enforced out of a married woman's separate estate upon a bond or promissory note given by her for the price of land conveyed to her sole and separate use.⁵ And while, in that State, a wife is not legally liable upon a promissory note made by her payable to her husband's own order, and by him indorsed over,⁶ she is held liable upon a promissory note signed by her upon consideration moving from her as tenant in common with her husband⁷ or another, or given for goods sold her on her sole credit, although she received no benefit therefrom.⁸

§ 259. **Combined Tests, as to Benefit and Express Intention, in charging Wife's Property.** — The equitable rule in which American cases, together with the latest English cases,⁹ generally agree, whether with reference to the equitable or statutory

¹ Third Nat. Bank v. Blake, 73 N. Y. 260.

² Williamson v. Dodge, 5 Hun, 497.

As to a *bona fide* holder for value before maturity, it is held in Virginia that a married woman's signature or indorsement of a blank note holds her to the extensive obligations which the law imposes upon parties *sui juris*, so far as charging her separate estate is concerned. Frank v. Lillienfeld, 83 Gratt. 377. But this seems contrary to the general tenor of American decisions independently of broad statutes and the equitable rule requiring her contract to be beneficial to her, &c.; and it rather appears that in such cases

all who rely upon a married woman's signature or indorsement are bound to take notice of the consideration upon which it was procured. See §§ 261-264, *post*.

³ Graves v. Phillips, 20 Ohio St. 371.

⁴ Exhaustion of the proceeds in payment of prior liens does not affect a creditor's right to recover out of the residue of the estate. Avery v. Van Sickle, 35 Ohio St. 296.

⁵ Rogers v. Ward, 8 Allen, 887; Estabrook v. Earle, 97 Mass. 302.

⁶ Roby v. Phelon, 118 Mass. 541.

⁷ Burr v. Swan, 118 Mass. 588.

⁸ Allen v. Fuller, 118 Mass. 402.

⁹ *Supra*, §§ 244-246.

separate property of the wife, is, that the separate estate of a married woman becomes chargeable with the due performance of her engagements or obligations made or incurred upon its express credit or for its benefit.¹ Benefit is not the sole test; but to the extent of her power of disposition over her separate estate the wife may charge it with such engagements as she sees fit to make, provided the evidence of intention be satisfactory (upon which point States differ) and provided, of course, that the transaction were voluntary on her part and not fraudulently procured.

In order to charge the separate estate of a married woman with a debt, as the cases now to be examined will show, a specific agreement to that effect is not indispensable; but the intent, or the creditor's right to procure such charge, may be inferred from the surrounding circumstances.²

§ 260. *Whether Wife may bind as Surety or Guarantor.*—Where a married woman having separate estate executes a promissory note as surety for another, such estate is presumably charged with its payment in Ohio,³ Maine,⁴ Missouri,⁵ and some other States.⁶ But the rule, as we have seen, is (or was lately) otherwise in New York,⁷ and Massachusetts,⁸ and New Jersey;⁹ and the same may be said as to Georgia,¹⁰ Tennessee,¹¹ Nebraska,¹² and other States.¹³ In Louisiana a married woman may bind herself as surety for any one except her husband.¹⁴

A married woman's promissory note does not, as a rule, secure her husband's debts, nor does she, by executing it, bind herself lawfully as his surety or guarantor on a contract not relating to her separate estate, nor for its benefit, so as to render

¹ Patrick v. Littell, 36 Ohio St. 79.

² Conlin v. Cantrell, 64 N. Y. 217; Harshberger v. Alger, 31 Gratt. 52.

³ Avery v. Van Sickle, 35 Ohio St. 271.

⁴ Mayo v. Hutchinson, 57 Me. 546.

⁵ Lincoln v. Rowe, 51 Mo. 571; Metropolitan Bank v. Taylor, 53 Mo. 444.

⁶ See Wicks v. Mitchell, 9 Kans. 80; Wood v. Orford, 52 Cal. 412.

⁷ Yale v. Dederer, 22 N. Y. 450; s. c. 68 N. Y. 329; *supra*, § 256. But see Woolsey v. Brown, 74 N. Y. 82.

⁸ Willard v. Eastham, 15 Gray, 328.

⁹ Perkins v. Elliott, 7 C. E. Green, 127. A married woman cannot be sued at law on such a promissory note. Van Kirk v. Skillman, 5 Vroom, 109.

¹⁰ Veal v. Hurt, 68 Ga. 728; Saubury v. Weaver, 59 Ga. 254.

¹¹ Robertson v. Willburn, 1 Lea, 633.

¹² State Savings Bank v. Scott, 10 Neb. 83.

¹³ See Harris v. Finberg, 46 Tex. 79.

¹⁴ Wickliffe v. Dawson, 19 La. Ann. 48.

herself liable to suit.¹ The same may be said, though perhaps with more reserve, of her undertakings for the benefit of third parties; as a mere accommodation indorser, for instance.²

The tendency of some of the late cases is to exempt promissory notes which are drawn payable to a married woman or order from all liability for the husband's engagements; a presumption being thus afforded that the money is due to her and not to her husband.³

Since the second decision in *Yale v. Dederer* the New York statute of 1860 provides that any married woman possessed of real estate as her separate property may bargain, sell, and convey such property, and "enter into any contract" in reference to the same. By way of construing this statute, together with the prior acts of 1848 and 1849, the New York Court of Appeals has charged a married woman as party without consideration to a promissory note, where she added, as promisor or special indorser, express words charging the payment of the note on her separate property.⁴ She may therefore now become a surety or guarantor,⁵ by force of statute, not only in New York but in some other States,⁶ though the statute of frauds must apply to her oral promise to be liable for another.⁷

In New Jersey, on the other hand, where no such power was given under statute for the married woman to dispose of her separate property as has been conferred by the New York legislature, equity has refused to recognize any power in a married woman, independently of appropriate legislation, to

¹ *Parker v. Simonds*, 1 Allen, 258; *Russell*, 91 Ill. 138; *Bailey v. Pearson*, Shannon v. Canney, 44 N. H. 592; 9 Fost. 77; *Lytle's Appeal*, 36 Penn. St. Keaton v. Scott, 25 Geo. 652; *Yale v.* 131; *Peake v. La Baw*, 6 C. E. Green, Dederer, 18 N. Y. 265; *Emery v. Lord*, 269; *Bauer v. Bauer*, 40 Mis. 61. 26 Mich. 431; *Schmidt v. Postel*, 63 Ill. 68; *Sweazy v. Kammer*, 51 Iowa, 642; 585; *Lewis v. Harris*, 4 Met. (Ky.) 358; King v. Thompson, 59 Ga. 380; *Athol Machine Co. v. Fuller*, 107 Mass. 437; Chapman v. Williams, 18 Gray, 416; Wolff v. Van Meter, 19 Iowa, 184; Paine v. Hunt, 40 Barb. 75; *Tooke v. Newman*, 75 Ill. 215. 209; *Sweeney v. Smith*, 15 B. Monr. 325. 4 Corn Exchange Ins. Co. v. Babcock, 42 N. Y. 613. And see *Sawyer v. Fernald*, 59 Me. 500; *De Vries v. Conklin*, 22 Mich. 255; *Vankirk v. Skillman*, 5 Vroom, 109.

² *Shannon v. Canney*, 44 N. H. 592; *Crane v. Kelley*, 7 Allen, 250; *Kohn v.*

³ *Lennox v. Eldred*, 65 Barb. 410.

charge her separate statutory estate by any writing, even though it contain words which show a clear intention to bind such estate, except by a mortgage acknowledged as required by law, or for debts contracted for the benefit of her separate estate, or for her own benefit on the credit of it; and hence it declines to impose a lien on the wife's separate estate because of her note as surety, even though by express words she charges the payment of that note on her separate property.¹ In other States the wife's capacity to make a contract of suretyship or guaranty is still denied;² and quite generally her simple indorsement of a bill or note is held to be inoperative beyond divesting her of a title therein.³

§ 261. *Inquiry into Consideration Pertinent; Promissory Notes, Bonds, &c., within Rule.* — Inquiry into consideration is always pertinent under the equity rule, and in States where the wife is not invested with plenary power of legal disposition under appropriate statutes. This applies to the wife's promissory note, which, as the law stands, apart from statute, cannot be a safe investment for any one; for its value consists in the proof that it was a contract on her part, and a binding contract, relative to her separate property, within the general rule. Even in Massachusetts, where the wife's mortgage on real estate duly executed is upheld, a note secured by it, if for unbeneficial consideration, such as the husband's indebtedness, could not be enforced.⁴ But the latest legislation in Massachusetts does not require the consideration of a wife's contract to enure to her own benefit, and her joint note with her husband, or her indorsement, binds her to quite or nearly the same extent as that of any single woman.⁵

But whether by promissory note, bond, oral or written promise, the instrument and the proof, taken together, must disclose the intention⁶ to charge her separate estate expressly,

¹ *Perkins v. Elliott*, 7 C. E. Green, 127; *Kohn v. Russell*, 91 Ill. 138; *Dunbar v. Mize*, 53 Ga. 435.

² *Russel v. People's Savings Bank*, 89 Mich. 671.

³ *Moreau v. Branson*, 37 Ind. 195.

⁴ *Heburn v. Warner*, 112 Mass. 271. And see *Wright v. Dresser*, 110 Mass. 51.

⁵ *Major v. Holmes*, 124 Mass. 106; *Kenworthy v. Sawyer*, 125 Mass. 28; *Goodnow v. Hill*, 125 Mass. 587.

⁶ The presumption is that a contract entered into by a married woman having a separate estate, for its benefit or for her exclusive benefit, was contracted upon the credit of her estate. *Williams v. King*, 43 Conn. 509.

or else some beneficial object for which the money was raised. If a loan is made to the wife, the purpose of that loan must be established by the lender as the test of his right to recover.¹ So, too, if she gives a bond, whether as surety or otherwise,² or signs or indorses a promissory note.³ And in some States, even in equity, as to her properly executed conveyance of real estate.⁴ But on the other hand the general property rights of married women being now recognized by sundry statutes, their right in equity to make contracts affecting their property is no longer limited to property settled to a sole and separate use; and although in numerous instances statutory requisites for making the contract binding in law may be wanting, equity will bind her property, nevertheless, where she or her estate has received the benefit of the transaction.⁵ We speak here with a constant reservation of *feme sole* liabilities acquired under local statutes which may affect all such issues.

§ 262. **Oral or Written Evidence of Intent, whether a Material Point.** — Agreeably to English chancery rules, it is held immaterial by the better authorities whether the wife's debt chargeable on her personal property be evidenced by written instrument or parol promise.⁶ For the charge of a debt, suitably contracted by a married woman upon her separate estate, is not a specific lien; but equity charges it upon all the property, real or personal, she may have when satisfaction is demanded and sought.⁷ But a written expression of actual consideration is not readily to be contradicted by parol evidence to the contrary.⁸ In case of security generally, equity may well consider which is principal and which accessory upon the point of parol evidence.⁹

§ 263. **Equity charges Engagement on General as well as Specific Separate Property.** — Equity will charge a debt, and

¹ Way v. Peck, 47 Conn. 23; Viser v. Scruggs, 49 Miss. 706.

² Gosman v. Cruger, 69 N. Y. 87.

³ Cases *supra*; Flanders v. Abbey, 6 Bis. 16; Conrad v. Le Blanc, 29 La. Ann. 123.

⁴ Sutton v. Aiken, 62 Ga. 738.

⁵ Donovan's Appeal, 41 Conn. 551.

⁶ Miller v. Brown, 47 Mo. 505; Elliott v. Gower, 12 R. I. 79.

⁷ Maxon v. Scott, 55 N. Y. 247;

Dale v. Robinson, 51 Vt. 20.

⁸ Johnson v. Sutherland, 39 Mich. 579.

⁹ Thacher v. Churchill, 118 Mass.

108.

even one with mortgage or other collateral security upon specific property, upon the wife's separate property generally, so long as the debt was contracted for the benefit of the wife's separate property.¹ At law, of course, there may be no such remedy; and yet it should be borne in mind that local legislation frequently extends the legal rights of a married woman in this same direction.

§ 264. *Wife's Executory Promise, whether Chargeable; her Purchase on Credit, &c.* — In general it is held that a married woman cannot become personally liable on her general or executory promise except it concern expressly, under general rules, her benefit or her separate estate. Hence a note given by her upon any other consideration is void,² even though it be in the hands of a *bona fide* holder.³ The wife's bond for payment of money does not bind her personally.⁴ The wife cannot become a general borrower, even though she give a promissory note or security in the same connection.⁵ Her general engagements, in a word, without the scope of the general rules we have stated, will create no charge upon her separate property enforceable in equity.⁶ Some States, under their liberal enabling acts, repudiate such restrictions upon the *jus disponendi*.⁷

There is some difficulty in the purchase, by a married woman, of property, whether real or personal, on credit, arising out of the circumstance that she cannot make a contract for payment which will be personally binding. In New Hampshire it was held that a married woman could not, under the statutes as they stood a few years ago, make a contract for money or property in anticipation of the purchase of separate estate; and hence that her note given for money borrowed, wherewith to make such purchase, was void.⁸ But,

¹ *Armstrong v. Ross*, 5 C. E. Green, 109. *Way v. Peck*, 47 Conn. 23; *Viser v. Scruggs*, 49 Miss. 705.

² *Kenton Ins. Co. v. McClellan*, 43 Mich. 564; *Pippen v. Wesson*, 74 N. C. 437; *Stokes v. Shannon*, 55 Miss. 583. ⁶ *Williams v. Hugunin*, 69 Ill. 214; *supra*, § 257; *Huyler v. Atwood*, 26 N. J. Eq. 504; *Stilwell v. Adams*, 29 Ark. 346.

³ *Kenton Ins. Co. v. McClellan*, 43 Mich. 564.

⁴ *Huntley v. Whitner*, 77 N. C. 392.

⁵ *O'Daily v. Morris*, 31 Ind. 111;

⁷ See *Allen v. Fuller*, 118 Mass. 403; *Knapp v. Smith*, 27 N. Y. 277.

⁸ *Ames v. Foster*, 42 N. H. 381. But

on the other hand, the New York doctrine is that she may purchase property on credit; and if the vendor will run the risk of being able to obtain payment of the consideration of the sale, the transfer remains valid, and no estate will pass to the husband, whether the wife had previously any separate estate or not.¹ And her separate estate is in fact charged under suitable circumstances by her purchase on credit, as we have already seen.² There is much logical confusion on this point; and the true equity rule appears to be to regard not so much the credit as the consideration of that credit, whether it were for her benefit or on express credit of the separate property. Where the wife cannot be sued upon her promise to buy upon credit, she will not in equity be allowed to decline and yet keep the property too; and hence lands or personal property sold her on her credit, and for the benefit of her separate estate, have been treated as subject to the vendor's lien, even though the notes she gave by way of executory contract could not, as such, be enforced against her.³ And, once again, it is asserted, and quite fairly, that the sale to a married woman on credit is a voidable contract on her part; that she may either recede from the bargain and claim its annulment, or allow it to stand with a right in the vendor to subject the specific property to the payment of the debt.⁴

see later statutes of this State. *Batchelder v. Sargent*, 47 N. H. 262; *Blake v. Hall*, 57 N. H. 382. A similar rule applies in some other States. *Thompson v. Weller*, 85 Ill. 197.

¹ *Darby v. Calligan*, 16 N. Y. 21; *Knapp v. Smith*, 27 N. Y. 277. So in other States. *Chapman v. Foster*, 6 Allen, 136; *Shields v. Keys*, 24 Iowa, 298.

² *Supra*, §§ 258, 261.

³ *Pemberton v. Johnson*, 46 Mis. 342; *Bruner v. Wheaton*, *ib.* 363; *Carpenter v. Mitchell*, 54 Ill. 126; *Hunter v. Duval*, 4 Bush, 438; *Smith v. Doe*, 56 Ala. 456; *Boland v. Klink*, 68 Ga. 447.

⁴ *Nicholson v. Heiderhoff*, 50 Miss. 56. Beyond this, the court here observes, the vendor cannot go, nor can he coerce payment out of her other property; but she cannot retain pos-

session of the legal title, and plead her own disability in annulment of her obligation and security for the purchase-money. *Id.* *Sixbee v. Bowen*, 91 Penn. St. 149, asserts the rule of voidable contract on the wife's part so as to permit her to stand by it as against her husband's creditors.

A wife who induces a third person to buy her lands by her oral promise, with her husband's concurrence, that he may deduct from the price a debt due him from her husband, cannot, after full conveyance, repudiate this promise. *Meiley v. Butler*, 28 Ohio St. 535.

It is held in New York that a married woman is not liable for property obtained upon her credit and contract, but delivered to her husband and for his use, and which is used by him and

§ 265. **Wife's Purchase on Credit; Subject continued; Purchase of Lands.**—The current of negative authority on this point turns much towards the purchase of real estate by the wife; and, upon what ought to be deemed more fundamental reasons than those of cash or credit, it is held that a married woman is incapable of acquiring real property to her separate use under such circumstances.¹ This, however, is by no means a uniform doctrine; for a married woman may, as several State jurisdictions rule, acquire and hold real property to her separate use upon suitable consideration, whether she purchase it on credit or not.² Some of these decisions go only to the point of forbidding a suit at law on such purchases.³ And it is held that where a married woman borrows money with which she purchases a piece of land, taking a deed in her own name, and furnishing no note or other written obligation for the loan, the lender may in equity follow his loan into the land.⁴

§ 266. **Charging Wife where she lives apart from Husband.**—If the wife lives apart from her husband, all the more readily will her separate property be charged with debts contracted for her benefit or on the credit of such property.⁵

§ 267. **Wife's Ownership of Stock; Dominion and Liability.**—Transfers of a married woman's stock in a corporation require, under some statutes, the husband's written assent or joinder; under others, again, she may convey as if sole. After her transfer without observance of such requirements,

not for the benefit of her estate, where the intent to charge her separate estate is not expressed in the contract. *Manhattan Co. v. Thompson*, 58 N. Y. 80. In some States the test of the wife's liability is by statute limited expressly to purchases, &c., "for the benefit" of the wife's separate property, &c. *Wallace v. Finberg*, 46 Tex. 35; *National Bank v. Smith*, 43 Conn. 827. A Pennsylvania statute authorizes a married woman to loan money of her separate estate through the intervention of a trustee; and the power thus conferred, when freely and voluntarily exercised, gives to the transaction the form of a contract equally binding

on both parties. *Flattery v. Flattery*, 91 Penn. St. 474.

¹ *Ames v. Foster*, 42 N. H. 381; *Carpenter v. Mitchell*, 50 Ill. 470; *Dunning v. Pike*, 46 Me. 461; *Miller v. Albertson*, 73 Ind. 343.

² *Shields v. Keys*, 24 Iowa, 296; *Darby v. Calligan*, 16 N. Y. 21; *Chapman v. Foster*, 6 Allen, 186; *McVey v. Green Bay R.*, 42 Wis. 532.

³ *Carpenter v. Mitchell*, 50 Ill. 470.

⁴ *Donovan's Appeal*, 41 Conn. 561.

⁵ *Johnson v. Cummins*, 1 C. E. Green, 97; *Leonard v. Mason*, 1 Lea, 384; *Hodgson v. Williamson*, 42 L. T. 676; *Hazebaker v. Goodfellow*, 64 Ill. 238; *post*, Part IX.

she may, upon information of her legal rights, obtain a re-transfer in equity, notwithstanding subsequent purchasers have intervened.¹ A married woman is not personally liable, unless legislation be positive, for the debts of a corporation in which she holds stock, more than upon her contracts of suretyship.² To hold a married woman liable on her subscription to stock is not always favored ;³ but its purchase or subscription may often be upheld as a beneficial transaction.⁴

Consistently with the principle of the wife's non-liability as surety, it is held that she cannot be held liable to a pledgee, to whom she has pledged stock so as to secure her husband's debt, for money received by her upon a subsequent sale of the stock contrary to the pledgee's rights.⁵

§ 268. *Wife's Liability for Professional Services.* — In Rhode Island it is held that compensation of the wife's solicitor for prosecuting a suit in equity regarding her separate leaseholds cannot be recovered from her separate estate.⁶ As to legal fees for the wife's divorce, some States still disincline to charge her estate ; in absence, at all events, of an express undertaking on her part to that effect.⁷ But in New York, professional services rendered a married woman, as in collecting demands arising out of transactions permitted her by the statute, are recoverable under the general rule against her separate estate, as rendered by her procurement on its credit and for its benefit.⁸ Contracts by the wife for employing counsel in her property suits are in other States sustained more or less liberally, as in Indiana⁹ and Mississippi.¹⁰

§ 269. *Joinder of Husband in Wife's Contracts and Conveyances.* — The rule in many States, under the married women's acts, is that the husband must join the wife in contracts and conveyances relating to her separate property. Particularly is this true of transactions concerning the wife's real estate, upon which topic we have already spoken.¹¹ Contracts and

¹ *Merriam v. Boston R.*, 117 Mass. 241.

² *Russel v. People's Savings Bank*, 39 Mich. 671.

³ *Rice v. Columbus R.*, 32 Ohio St. 330.

⁴ *Williams v. King*, 43 Conn. 569.

⁵ *Platt v. Hawkins*, 43 Conn. 139.

⁶ *Cozzens v. Whitney*, 3 R. I. 79.

⁷ *Pfirshing v. Falsh*, 87 Ill. 260.

⁸ *Owen v. Cawley*, 36 N. Y. 600.

⁹ *Major v. Symmes*, 19 Ind. 117.

¹⁰ *Porter v. Haley*, 55 Miss. 66.

¹¹ *Supra*, § 240.

conveyances otherwise made are not considered binding.¹ But in North Carolina it has been decided, on equity principles, that where a wife after marriage, supposing the whole interest in her land was in her, made a conveyance to a trustee for her sole and separate use, which her husband signed as a party, and by various clauses manifested a concurrence in her act, but did not profess directly to convey any estate, the recital in the deed that ten dollars was paid by the trustee to the wife raised a use, and in that way passed the husband's interest to the trustee.² In many States the wife's conveyance directly to her husband is absolutely void in law and equity; and the safer course must be to convey through a third party;³ but in some States she may convey directly to him.⁴

The language of the married women's acts in many States authorizes the inference that nothing further than the written concurrence of the husband is requisite to complete the validity of the wife's transfer of separate personal property; the voluntary conveyance of the wife with her husband passes her separate estate, real or personal; nor is the husband's joinder always essential to her transfer of personal property.⁵ And in some States the wife's sole deed of her separate real estate is sufficient to pass her entire interest;⁶ though, so

¹ *Wright v. Brown*, 44 Penn. St. 224; *Camden v. Vail*, 23 Cal. 633; *MacLay v. Love*, 25 Cal. 367; *Pentz v. Simonson*, 2 Beal. 232; *Major v. Symmes*, 19 Ind. 117; *Miller v. Hine*, 18 Ohio St. 585; *Haugh v. Blythe*, 20 Ind. 24; *Dodge v. Hollinshead*, 6 Minn. 25; *Eaton v. George*, 42 N. H. 375; *Miller v. Wetherby*, 12 Iowa, 415; *Ezelle v. Parker*, 41 Miss. 520; *O'Neal v. Robinson*, 45 Ala. 526; *Bressler v. Kent*, 61 Ill. 426; *Greenholtz v. Haeffer*, 53 Md. 184; *Cole v. Van Riper*, 44 Ill. 58; *Armstrong v. Ross*, 5 C. E. Green, 109. And see *Wickliffe v. Dawson*, 19 La. Ann. 48. But see *Stacker v. Whitlock*, 8 Met. (Ky.) 244, where the right to sell or encumber is strictly construed.

² *Barnes v. Haybarger*, 8 Jones, 76.

³ *Kinnaman v. Pyle*, 44 Ind. 275; *Postnuptial Settlements*, *post*.

A deed not expressed on its face as discharging the lien of a mortgage held in trust for the wife does not operate to extinguish, even though husband and wife joined in the conveyance. *Klein v. Caldwell*, 91 Penn. St. 140.

⁴ *Wells v. Caywood*, 3 Col. 487; *Postnuptial Settlements*, Part VII. *post*.

⁵ *Trader v. Lowe*, 45 Md. 1.

⁶ *Springer v. Berry*, 47 Me. 330; *Farr v. Sherman*, 11 Mich. 33; *Hale v. Christy*, 8 Neb. 264; *Libby v. Chase*, 117 Mass. 105; *Beal v. Warren*, 2 Gray, 447. But a contemporaneous written assent of the husband is required by some statutes. *Melley v. Casey*, 99 Mass. 241; *Weed Sewing-Machine Co. v. Emerson*, 115 Mass. 564.

antagonistic is this to the old common law, that a clearly enabling statute should be required. But it has been held that the wife's execution of a conveyance in blank is void, though the deed be afterwards filled up according to her directions.¹

§ 270. *Wife's Conveyances of Land; Liability on Covenants, &c.* — Following the spirit of recent legislation, some American courts now hold the wife liable on her covenants contained in a conveyance of her separate lands;² or her agreement to assume a mortgage when taking a conveyance of lands so encumbered.³ So specific performance is decreed against her on her written promise to convey; provided the contract be executed with the formalities requisite in her conveyance.⁴ And equity will not permit the wife to avoid a sale without refunding the purchase-money.⁵ Under late Massachusetts statutes, moreover, a married woman may bind herself by her separate contract for the purchase of real estate.⁶ In other States her ratification of a defective conveyance, whether directly or by acts presumptive, is pronounced valid.⁷ All this, of course, is contrary to the old rule, which in many parts of the United States still obtains to a greater or less degree.⁸

¹ *Burns v. Lynde*, 6 Allen, 305. The husband's oral consent will not suffice, where the statute requires his written consent to her conveyance. *Towneley v. Chapin*, 12 Allen, 476. But as to sale of certain personal chattels, see *Holman v. Gillette*, 24 Mich. 414. The rules of the text apply to a power of attorney to sell the wife's separate land; and here the husband must join. *Dow v. Gould, &c. Co.*, 31 Cal. 629. As to conveying by power of attorney, see also *Weisbrod v. Chicago R.*, 18 Wis. 35; *Peck v. Hendershott*, 14 Iowa, 40; *Randall v. Kreiger*, 23 Wall. 137. Power in the wife to convey implies power to rescind the contract of sale under proper circumstances. *Scott v. Griggs*, 49 Ala. 185. As to the proper form of the husband's joinder in the deed States differ. See *Warner v. Peck*, 11 R. I. 431; *Friedenwald v. Mullan*, 10 Heisk. 226.

² *Basford v. Peirson*, 7 Allen, 524,

Gunter v. Williams, 40 Ala. 561; *Richmond v. Tibbles*, 26 Iowa, 474.

³ *Huyler v. Atwood*, 26 N. J. Eq. 504. And see *Fenton v. Lord*, 128 Mass. 466; *Coolidge v. Smith*, 129 Mass. 554.

⁴ *Woodward v. Seaver*, 38 N. H. 29; *Baker v. Hathaway*, 5 Allen, 103. See *Rumfelt v. Clemens*, 46 Penn. St. 455; *Stevens v. Parish*, 29 Ind. 260; *Love v. Watkins*, 40 Cal. 547.

⁵ *Kolls v. De Leyer*, 41 Barb. 208.

⁶ *Faucett v. Currier*, 109 Mass. 79. For the New Jersey rule, see *Pierson v. Lum*, 25 N. J. Eq. 390.

⁷ *Spafford v. Warren*, 47 Iowa, 47.

⁸ *Botsford v. Wilson*, 75 Ill. 133; *Stidham v. Matthews*, 29 Ark. 650; *supra*, Part IV.; *Gore v. Carl*, 47 Conn. 291; *Davidson v. Lanier*, 51 Ala. 818.

The wife may have her conveyance of separate land reformed in equity for mistake, the same as if she were sole. *Knox v. Brady*, 74 Ill. 476. But it is otherwise as to her mistakes in the con-

A wife who joins suitably with her husband or trustee in a conveyance of her separate or general property, so as legally to convey it in conformity with statute, cannot afterwards assert her equitable title so as to avoid altogether or change from an absolute to a security title, as against a *bona fide* purchaser for value, having no notice of her equitable claim;¹ nor, according to the growing opinion, assert a present or subsequent title after duly conveying her entire interest.² The recitals of her acknowledgment in the magistrate's certificate may be relied upon by a *bona fide* purchaser or mortgagee.³

§ 271. *Lease of Wife's Separate Lands.* — Under some married women's acts a lease to her, and its covenants, as for rent or taxes, are held binding upon the wife.⁴ Her lease, too, of her own separate premises is, on stronger grounds of benefit, upheld against her⁵ in several States, and even to the extent of her executing (where statutes so permit) without her husband's consent, and for a term of years.⁶

§ 272. *Improvements, Repairs, &c., on Wife's Lands; Mechanics' Liens.* — Upon the ground that the wife's separate estate

veyance of her husband's lands. *Id.* In Georgia, a deed by husband and wife to induce payment of the husband's debt passes no title in equity unless the wife received consideration; and notice that she is still owner is sufficient to put a stranger on inquiry. *Sutton v. Aiken*, 62 Ga. 783.

¹ *Pepper v. Smith*, 54 Texas, 115; *Comegys v. Clarke*, 44 Md. 108.

² *Knight v. Thayer*, 125 Mass. 25; *King v. Rea*, 56 Ind. 1. But see *Barker v. Circle*, 60 Mo. 258.

³ *Singer Man. Co. v. Rook*, 84 Penn. St. 442; *Marston v. Brittenham*, 76 Ill. 611; *Conn. Life Ins. Co. v. McCormick*, 45 Cal. 580; *Homœopathic Life Ins. Co. v. Marshall*, 32 N. J. Eq. 108.

⁴ *Worthington v. Cooke*, 52 Md. 297; *Marshall v. Marshall*, 4 Thomp. & C. 449; *Harris v. Williams*, 44 Tex. 124. As to wife's lease to her husband, see *Albin v. Lord*, 39 N. H. 196. But see *Eustaphieve v. Ketchum*, 18 N. Y. Supr. 621.

⁵ In Mississippi a parol lease for one year, made by a wife to her hus-

band, is not invalid. *America Bank v. Banks*, 101 U. S. Supr. 240. And see *Welsh v. Oates*, 9 Phila. 154. But as to her lease, oral or written, where the husband assumed to make it on her behalf, see *Muir v. Bissett*, 52 Vt. 287. Wife's verbal lease void in some States. *Keller v. Klopfer*, 8 Col. 132.

⁶ *Parent v. Calleraud*, 64 Ill. 97; *Douglass v. Fulda*, 50 Cal. 77; *Woodward v. Lindley*, 43 Ind. 333; *Child v. Sampson*, 117 Mass. 62. Void without her husband's joinder in execution. *De Wolf v. Martin*, 12 R. I. 533. But the usual local rule as to conveyances generally applies. *Child v. Sampson*, 117 Mass. 62. Whether husband can make it as wife's agent, see *Sanford v. Johnson*, 24 Minn. 172. Whether, where lease was executed by both spouses, the husband has any concern except as agent for receiving rents, accepting surrender, &c., see *Woodward v. Lindley*, 43 Ind. 333. In Illinois the wife must sue in her own name to recover rent. *Hayner v. Smith*, 68 Ill. 430.

should be bound by contracts for its benefit, or upon its express credit, her debts for improvements upon lands conveyed to her sole and separate use have been enforced in several late instances.¹ So, too, the joint contract² or joint note of herself and husband, or in some States her sole note or sole contract, for lumber and materials to be used thereon.³ It is a reasonable doctrine, and justified by some State decisions, that where lumber is purchased, or other materials, and used, or labor bestowed, with the wife's acquiescence, in benefiting and enhancing her separate estate, and with full knowledge on her part that it is unpaid for, and equitable obligation may be inferred, she is bound to recompense accordingly;⁴ but all States do not go so far. The disposition of the courts in such cases, where the contract was made by the husband, is frequently to infer an agency on the wife's behalf for that purpose; and yet he might prove no agent, and if only sole credit were given to the husband himself for repairs on his wife's premises, it would appear that the creditor cannot resort to the wife's separate estate for remuneration, agency not being inferable from the marital relation alone.⁵ It is the declared rule of many States that the husband cannot of his own act, and without his wife's consent, subject the latter's separate land to debts for improvements, or subject it to a mechanic's lien.⁶ But the mechanic's stat-

¹ *Conway v. Smith*, 18 Wis. 125; 452; *Shannon v. Bartholomew*, 53 Ind. *Marshall v. Miller*, 8 Met. (Ky.) 333; 54. But cf. *Emery v. Lord*, 26 Mich. 431; *Capp v. Stewart*, 38 Ind. 479.

² *Fowler v. Seaman*, 40 N. Y. 592; *Carpenter v. Leonard*, 5 Minn. 155; *Perkins v. Baker*, 88 Tex. 45; *Britter v. Robertson*, 11 Tex. 142. In *Heugh v. Jones*, 32 Penn. St. 482, it is held that unless the materials are *actually* so used the debt cannot be enforced against the estate. And see as to the Pennsylvania rule, which does not favor such debts, *Brunner's Appeal*, 47 Penn. St. 67.

³ *Pierce v. Kittredge*, 115 Mass. 374.

⁴ *Parker v. Kane*, 4 Allen, 346; *Major v. Symmes*, 19 Ind. 117; *Eckert v. Reuter*, 4 Vroom, 266; *Langenbach v. Schell*, 40 Conn. 224.

⁵ *Miller v. Hollingsworth*, 36 Iowa, 163; *Anderson v. Armstead*, 69 Ill.

⁶ *Holmes v. Bronson*, 48 Mich. 562; *Willard v. Magoon*, 80 Mich. 273; *Price v. Seydel*, 46 Iowa, 696; *Lauer v. Bandon*, 48 Wis. 556; *Crickmore v. Breckenridge*, 51 Ind. 294; *Lobman v. Kennedy*, 51 Ala. 163; *Roberts v. Kelley*, 51 Vt. 97. A promise by the married woman to pay for materials bought and used by the husband in erecting buildings on her land will not be inferred from her contemporaneous knowledge alone. *Ferguson v. Spear*, 65 Me. 277.

⁷ *Briggs v. Titus*, 7 R. I. 441; *Spinning v. Blackburn*, 18 Ohio St. 131; *Warren v. Smith*, 44 Tex. 245; *Pell v. Cole*, 2 Met. (Ky.) 252; *Selph v. How-*

utory right of lien generally extends to a married woman's lands where she contracted in person or by agent, and perhaps, too, where the contract was for the benefit of the land.¹ A husband's *bona fide* investment of money in improvements upon his wife's estate cannot be subjected to satisfaction of the claims of his creditors.²

Apart from permanent improvements, a married woman's real estate may well be rendered liable for repairs made to her separate estate at her own request, and as necessary for its due preservation and enjoyment.³ And where she contracts for services or materials, or the work and labor is done, at her request, in and about the improvement, care, management, or cultivation of the premises, or in farm stock, she will be held liable accordingly, where the premises and farm stock are her sole and separate property.⁴ It is held, too, that where the wife's lands are devoted to agriculture, the husband may burden the estate for things necessary to the production of crops.⁵

§ 273. **Same Subject; Wife's Written Acknowledgment; Insurance on her Real Estate.**—Independently of enabling statutes, the written contract of a married woman, by which she acknowledges an indebtedness for materials and labor used to improve her separate estate, is void at law.⁶ Nor is her contract for insurance on her separate property enforceable against her, as conservative States rule,⁷ though this would appear to be a beneficial contract; and at all events it is held that her contract of insurance on her property cannot be defeated by third persons.⁸

land, 23 Miss. 264; Hughes v. Peters, 1 Cold. 67; Esslinger v. Huebner, 22 Wis. 682; Garnett v. Berry, 3 Mo. App. 197; Holley v. Huntington, 21 Minn. 325. Nor even for necessary repairs. Dearie v. Martin, 78 Penn. St. 55.

¹ Vail v. Meyer, 71 Ind. 159; *Ex parte* Schmidt, 62 Ala. 252; Burdick v. Moon, 24 Iowa, 418; Woodward v. Wilson, 68 Penn. St. 208; Anderson v. Armstead, 69 Ill. 452; Schwartz v. Saunders, 46 Ill. 18; Lindley v. Cross, 31 Ind. 106; Marsh v. Alford, 5 Bush, 392. The mechanic's lien claim must, in some States, show on its face all

the requisites. Loomis v. Fry, 91 Penn. St. 396.

² McFerrin v. Carter, 3 Baxt. 335.

³ Lippincott v. Leeds, 77 Penn. St. 420. Coverture of the owner is no reason why land should not be assessed for cost of street improvement. Ball v. Balfie, 41 Ind. 221.

⁴ Terry v. Hammonds, 47 Cal. 32; Cookson v. Toole, 59 Ill. 515.

⁵ Clopton v. Matheny, 48 Miss. 286.

⁶ Williams v. Wilbur, 67 Ind. 42.

⁷ American Ins. Co. v. Avery, 60 Ind. 566.

⁸ Bernheim v. Beer, 56 Miss. 149.

§ 274. *Mortgage of Wife's Separate Real Estate.*—The husband cannot mortgage his wife's separate property for his individual debt.¹ For it is a general principle that the wife's separate property cannot be made liable for the debts of her husband or others without her assent.² But a mortgage given by a married woman upon her separate estate, acknowledged in conformity with the statute, and with the joinder of the husband, is a valid security and capable of enforcement; not alone where she had it mortgaged to secure her own or her husband's debt, but also, in a case free from fraud or undue influence, where it was mortgaged for the benefit of a third person.³

But in all such cases the wife's rights as surety are carefully guarded; and the husband cannot pervert the security to her detriment, nor bind her by his own agreement for extension or discharge.⁴ Her right to exoneration from his estate as a creditor after his death applies with reference to

¹ *Patterson v. Flanagan*, 1 Ala. s. c. 427.

² *Hutchins v. Colby*, 48 N. H. 159; *Hatz's Appeal*, 40 Penn. St. 209; *George v. Ransom*, 15 Cal. 322; *Cheuvete v. Mason*, 4 Greene (Iowa), 231; *Yale v. Dederer*, 18 N. Y. 235; *Sharp v. Wickliffe*, 8 Litt. 10; *Johnson v. Runyon*, 21 Ind. 115.

³ *Galway v. Fullerton*, 2 C. E. Green, 389; *Marlow v. Barlew*, 53 Cal. 456; *Beals v. Cobb*, 51 Me. 348; *Jeffries v. Green*, 79 N. C. 330; *Voorhies v. Granberry*, 5 Baxt. 704; *First Nat. Bank v. Haire*, 36 Iowa, 443; *Haffey v. Carey*, 73 Penn. St. 431; *Jordan v. Peake*, 38 Tex. 429; *Bartlett v. Bartlett*, 4 Allen, 440. But in *Mississippi* she cannot mortgage for her husband's debts beyond the extent of her separate income, though her husband may be bound to the usual extent. *Foxworth v. Magee*, 44 Miss. 430; *Hand v. Winn*, 52 Miss. 784. See *Wilkinson v. Cheatham*, 45 Ala. 387; *Coleman v. Smith*, 55 Ala. 368; *Conrad v. Le Blanc*, 29 La. Ann. 128; *Keller v. Ruiz*, 21 La. Ann. 288, which lay down a strict rule on this point.

As to giving security by means of an absolute deed, and the title becoming absolute in the lender by reason of a breach, see *Mashburn v. Gouge*, 61 Ga. 512. A wife's separate statutory estate in her realty is not, in Rhode Island, subject to an equitable charge for her individual contracts in favor of her creditors. *Angell v. McCullough*, 12 R. I. 47. A wife may charge her separate estate by a mortgage to secure a loan made by a building association to her husband as a member. *Juniata Association v. Mixell*, 84 Penn. St. 813.

⁴ *Savage v. Winchester*, 15 Gray, 453; *Hanford v. Bockee*, 5 C. E. Green, 101; *Bank of Albion v. Burns*, 46 N. Y. 170; *Faulks v. Dimock*, 27 N. J. Eq. 65; *Hubbard v. Ogden*, 22 Kan. 363; *Purvis v. Carstaphan*, 73 N. C. 575. But see *Zane v. Kennedy*, 73 Penn. St. 182. Where the mortgagee before sale is allowed to enter and take the rents without the wife's consent, he must account to her, and cannot credit the same on the husband's debt. *Semple v. British Columbia Bank*, 5 Sawyer C. C. 894.

mortgages of her separate lands for the benefit of herself and her heirs.¹ And, on the other hand, where she is a mortgagee in her own right, the husband cannot alone receive payment and satisfaction and discharge the mortgage.² The creditor's agreement of defeasance accompanying the transaction, or covenants on his part, must be faithfully observed;³ and as to other security her rights are the usual ones.⁴

It must be remembered that in certain States a conservative policy is still pursued, so as to prohibit the wife's mortgage to a greater or less extent, and with reference, perhaps, to the beneficial nature of the consideration.⁵

§ 275. **Appointment as to Lands; Imperfect Execution; Effect of Equitable Mortgage.** — It is held in New Jersey that a married woman cannot charge her separate real estate by an appointment in writing; but can only convey or charge it by deed duly executed with her husband and acknowledged, save in certain cases where she and her husband live apart. But it appearing in a late case that her real-estate mortgage was void, in which the husband had not joined, equity nevertheless charged the mortgage debt upon her separate property generally where the debt was contracted for the benefit of that property.⁶ An equitable assignment of note and mortgage on her part is recognized in some other States.⁷ Other States, once more, insist strictly upon the pursuance of statute formalities, whether the issue be raised in law or equity.⁸ If equity establish a lien, the lien will have no retroactive operation, so as to affect *bona fide* rights previously acquired.⁹

§ 276. **Mortgage of Wife's Lands; Miscellaneous Points.** — In some States a wife is now, by statute, rendered liable for a

¹ *Id.*; *Kinner v. Walsh*, 44 Mis. 65.

² *McKinney v. Hamilton*, 51 Penn. St. 63.

³ *Lomax v. Smyth*, 50 Iowa, 228.

⁴ *Wilcox v. Todd*, 64 Mo. 388.

⁵ *Bowers v. Van Winkle*, 41 Ind. 432; *Thames v. Rembert*, 63 Ala. 561; *Lippincott v. Mitchell*, 91 U. S. Supr. 787; *Coleman v. Smith*, 55 Ala. 368.

⁶ *Armstrong v. Ross*, 5 C. E. Green, 109; *Homeopathic Life Ins. Co. v. Marshall*, 82 N. J. Eq. 108.

⁷ *Baker v. Armstrong*, 57 Ind. 189.

In equity, even though the trust be created by parol, it binds the wife; for the note a chattel is the principal and the mortgage but accessory. *Thacher v. Churchill*, 118 Mass. 108.

⁸ *Herdman v. Pace*, 85 Ill. 345; *supra*, § 269.

⁹ *Lewis v. Graves*, 84 Ill. 205. An unrestricted power to sell includes a power to mortgage. See *Zane v. Kennedy*, 78 Penn. St. 182.

deficiency on the foreclosure of her mortgage;¹ which, of course, is contrary to the earlier and modern equity rule;² and she may, as part of the consideration of a conveyance to her, assume an existing mortgage on the premises.³ And mortgages with power of sale are among those which a wife may now execute; a sale under such power effectually barring her equity of redemption.⁴ The mortgage, to be good, should identify the property as general rules require.⁵

The loan of money to a married woman, with which she paid off a mortgage on her land, gives no lien on such land to the lender, notwithstanding her oral promise to substitute him.⁶ And where a married woman receives money on a parol contract for the sale of her lands, but fails to convey, a personal action cannot be maintained against her to recover the money so paid, nor can it be made a matter of set-off in an action on a promissory note brought by her against the party who has paid such money.⁷

According to the more liberal doctrine, one who advances money to a married woman, whether on her bond, promissory note, or otherwise, is not bound to see to the application of the money, but may recover upon the instrument or contract on showing the avowed purpose of the transaction on her part, as in due compliance with the general rule as to a married woman's *jus disponendi*.⁸

§ 277. **Wife's Separate Property; Husband as Managing Agent.** — The undoubted right of the wife, on general principles, to treat her husband as the trustee of her separate

¹ *Marlow v. Barlew*, 53 Cal. 456; *Cushman v. Henry*, 75 N. Y. 108. But not where the wife joins in executing the mortgage and not the note. *Kirby v. Childs*, 10 Kan. 639.

² *Brick v. Scott*, 47 Ind. 299.

³ *Cushman v. Henry*, 75 N. Y. 108; *Huyler v. Atwood*, 26 N. J. Eq. 404.

⁴ *Barnes v. Ehrman*, 74 Ill. 402. As to looking up a title for a mortgage, where a single woman has afterwards married, see *Cleaveland v. Savings Bank*, 129 Mass. 27.

⁵ *Brick v. Scott*, 47 Ind. 299.

Concerning the wife's sole mortgage

of her personal property under local statutes, see *Root v. Schaffner*, 39 Iowa, 375.

For the application of payments where husband and wife mortgage her estate to secure her own debt and also a debt of the husband's, see *Williams v. Schwab*, 56 Miss. 388.

⁶ *Owens v. Johnson*, 8 Baxt. 265.

⁷ *Sanford v. Wood*, 49 Ind. 165.

⁸ *McVey v. Cantrell*, 70 N. Y. 295. But see *Heugh v. Jones*, 32 Penn. St. 432, which tends more strongly to the protection of married women in such transactions.

property, has given rise, under the married women's acts, to perplexing questions as between herself and his creditors. In New York, her privileges in this respect are carried very far; for she may employ her husband as her managing agent to control her property, without subjecting it to the claim of his creditors; the application of an indefinite portion of the income to his support does not impair her title to the property; and neither he nor his creditors will acquire an interest in the property through his services thus rendered.¹ She may give him a power of attorney and require him to pursue its terms carefully.² In Illinois, too, it is well recognized that the wife may make her husband her agent to collect debts due her, to receive from others the income of her estate, and, like other agents, to manage and control her separate property in her name.³ Such, too, is the rule of certain other States, to the practical disadvantage of the husband's creditors, as well as for the wife's protection against her husband.⁴

The husband's agency, whether created under suspicious circumstances or not, as regards the public, is, like other agencies, a matter of fact for legal ascertainment upon all the proof. The courts in Illinois go so far as to hold that the husband's dealings with his wife's separate property will now be presumed, in the absence of proof to the contrary, to be in the character of agent, even as to the proceeds and income thereof; and hence rendering him liable to account like other agents, with allowance of his reasonable compensation, but so as to require him to establish any claim he may make of a gift or legal transfer to him, by due proof that the wife so assented and understood; in short, that the common-law rights of the husband to the wife's property are swept away.⁵ But in such a presumption other States by no means concur. Thus in Missouri it is said that, to establish an agency of the husband on his wife's behalf, the evidence must be more cogent and strong, and more satisfactory than

¹ *Buckley v. Wells*, 33 N. Y. 518;
Knapp v. Smith, 27 N. Y. 277.

² *Nash v. Mitchell*, 71 N. Y. 199.

³ *Patten v. Patten*, 75 Ill. 446.

⁴ *Aldridge v. Muirhead*, 101 U. S. Supr. 397; *Coleman v. Semmes*, 56 Miss. 321; *Wells v. Smith*, 54 Ga. 262.

⁵ *Patten v. Patten*, 75 Ill. 446.

would be required between persons occupying different positions.¹

It follows that the husband may now be employed, either with or without compensation, as his wife's agent in the management of her lands.² And under such an agency the produce or rent of the lands and increase of animals are the wife's property as fully as the original property whence they are derived; and the husband's purchase of lands with such profits, or the raising of a crop thereon under his supervision, does not necessarily subject land or crop to his debts.³

§ 278. *Husband as Managing Agent; Subject continued.* — A married woman cannot give to any agent a power which she does not herself possess as to her separate estate.⁴ And in some States the assent of the husband to the wife's transfer or conveyance is held so strictly a personal trust, that the husband cannot delegate it by letter of attorney to another.⁵ In Maine the husband may sue for damages to his wife's separate estate while managing it for her.⁶ And the wife may employ other agents, who will not be held answerable to him for executing her orders.⁷ In Michigan a husband who acted as agent of his wife in selling her land and taking a mortgage for deferred payments, and then became the assignee of the mortgage, has been treated directly as vendor and mortgagee, as to equities growing out of fraud or deceit on his part in the transaction.⁸ The husband's personal receipt of his wife's separate property in general will not discharge a third party from liability to the wife where the circumstances repel a presumption of agency on the husband's part.⁹

¹ *Eystra v. Capelle*, 61 Mo. 578. See, further, *Aldridge v. Muirhead*, 101 U. S. Supr. 397; *Paine v. Farr*, 118 Mass. 74.

² *Walker v. Carrington*, 74 Ill. 446; *Bongard v. Core*, 82 Ill. 19.

³ *Bongard v. Core*, 82 Ill. 19.

⁴ *Kenton Ins. Co. v. McClellan*, 43 Mich. 564.

⁵ *Meagher v. Thompson*, 49 Cal. 189. But see *Douglass v. Fulda*, 50 Cal. 77. A curative act may validate a convey-

ance of a wife's land improperly by power of attorney. *Randall v. Kreiger*, 23 Wall. 137.

⁶ *Woodman v. Neal*, 48 Me. 266. But only in her name, in accordance with statute.

⁷ *Southard v. Plummer*, 36 Me. 64.

⁸ *Burchard v. Frazer*, 23 Mich. 224.

⁹ *Read v. Earle*, 12 Gray, 423; *Anderson v. Gregg*, 44 Miss. 170. Possession of the bond or incorporeal chattel by the husband is evidence tending

In some States the husband cannot dispose of his life-interest in his wife's lands at all, without the wife's assent.¹ He cannot sell her separate real estate during her life by his own deed.² His receipt of money payable on her separate account — a legacy for instance — without her consent or authority does not debar her of her legal rights.³ He cannot dispose of his wife's personal property — her capital especially — at his own discretion.⁴ He cannot of himself bind her estate by employing counsel with reference to it.⁵ In Alabama the husband's rights as his wife's managing attorney are declared not to extend to binding her by the submission to arbitration of questions relating to the *corpus* of her separate estate.⁶ And, in general, if the wife's property is not liable for her husband's debts, much less can it be made so for his frauds regarding such property, without her participation.⁷ But the "managing agent" doctrine has its limits, in New York, as elsewhere; and where there is a mere shifting of property from husband to wife, and from wife back to husband as her managing agent; or where the husband, doing business as his wife's agent, obtains goods on credit under false pretences, and then gets her to make an assignment of them, such an artifice for evading his creditors is likely to fail.⁸ Ratification of his unauthorized acts as attorney may be presumed in some instances by her acts and conduct; to his violation of private instructions should apply the usual rules;⁹ but evidence to bind the principal should perhaps be stronger where a wife is concerned, than in the ordinary case of an agent.¹⁰ Declara-

to prove authority to receive the money for his wife, but not conclusive evidence. *Yazel v. Palmer*, 81 Ill. 82; *Carver v. Carver*, 58 Ind. 241. And see *Nevius v. Gourley*, 95 Ill. 206; *Windsor v. Bell*, 61 Ga. 671.

¹ *Coleman v. Satterfield*, 2 Head, 259; *Jenney v. Gray*, 5 Ohio St. 45. *Aliter* in some States. *Coleman v. Semmes*, 56 Miss. 321.

² *Prater v. Hoover*, 1 Cold. 544.

³ *Gore v. Carl*, 47 Conn. 291; *Nevius v. Gourley*, 95 Ill. 206; *Read v. Earle*, 12 Gray, 423; *Windsor v. Bell*, 61 Ga. 671; *Anderson v. Gregg*, 44 Miss. 170.

⁴ *O'Brien v. Foreman*, 46 Cal. 80; *Klein v. Seibold*, 89 Ill. 540.

⁵ *Kerchner v. Kempton*, 47 Md. 568.

⁶ *Sampley v. Watson*, 43 Ala. 377.

⁷ See *Lawrence v. Finch*, 2 C. E. Green, 234.

⁸ *Warner v. Warren*, 46 N. Y. 228; *Edgerly v. Whalan*, 106 Mass. 307; *Little v. Willets*, 55 Barb. 125.

⁹ *Griffin v. Ransdell*, 71 Ind. 440.

¹⁰ *Ladd v. Hildebrant*, 27 Wis. 135; *Wells v. Thorman*, 37 Conn. 818; *McLaren v. Hall*, 26 Iowa, 297; *Lichtenberger v. Graham*, 50 Ind. 288; *Merrill v. Parker*, 112 Mass. 250. And see *Chappell v. Boyd*, 61 Ga. 662.

tions not made at the time of a transaction, and disconnected with his act as her agent, are not admissible in evidence against her, even though they might be as against himself.¹

§ 279. **Husband as Managing Agent; Subject continued.**—Goods bought by the husband on his wife's credit do not necessarily become part of her statutory separate estate apart from her authority or acquiescence.² And, on the other hand, where one furnishes goods, or contracts to render service, or supplies materials, giving credit to the wife alone, and dealing with her or her agent, the husband will not be liable out of his own property, even though he receive some substantial benefit.³

§ 280. **Husband as Managing Agent; His Compensation, &c.**—It seems to be the well-settled American doctrine that by working upon the wife's lands the husband acquires no beneficial interest therein which can be enforced in equity on behalf either of himself or his creditors, in absence of a definite agreement for compensation; unless, possibly, it could be shown to exceed in value the cost of supporting the whole family.⁴ The crops cannot be attached by his creditors.⁵ Nor the betterments, buildings, and rents.⁶ Nor is his use upon his wife's farm, of teams bought with her money, a conversion in any such sense as to render them attachable for his debts.⁷

With the assent of the husband and father, the labor of the wife and children may be bestowed upon the separate property of the wife, and thus enure to their benefit. There is no known rule of law which requires the husband and father to compel his wife and children to work in the service of his creditors.⁸ And it is held that the husband may stipulate,

¹ *Livesley v. Lasalette*, 28 Wis. 38; *Commonwealth v. Fletcher*, 6 Bush, 171. *Warner v. Warren*, 46 N. Y. 228.

² *Wilder v. Abernethy*, 54 Ala. 644; *Roberts v. Kelley*, 51 Vt. 97.

³ *Happek v. Hartley*, 7 Baxt. 411. And see chs. 6, 7, *post*, as to wife's earnings, trade, necessities, &c.

⁴ *Buckley v. Wells*, 38 N. Y. 518; *Webster v. Hildreth*, 33 Vt. 457; *Cheuvete v. Mason*, 4 Greene (Iowa), 231; *Betts v. Betts*, 18 Ala. 787;

⁵ *McIntyre v. Knowlton*, 6 Allen, 565; *Lewis v. Johns*, 24 Cal. 98; *Allen v. Hightower*, 21 Ark. 316.

⁶ *White v. Hildreth*, 32 Vt. 265; *Goss v. Cahill*, 42 Barb. 310; *Wilkinson v. Wilkinson*, 1 Head, 305; *Robinson v. Huffman*, 15 B. Monr. 80.

⁷ *Spooner v. Reynolds*, 50 Vt. 437.

⁸ *Johnson v. Vail*, 1 McCart. 423.

though insolvent, that the product of his own labor shall be appropriated to his wife's separate use.¹ If permitted to be maintained upon his wife's property, he does not necessarily acquire a title to the property or its products merely by bestowing his voluntary labor upon it.² And a similar principle may be applied to a wife supported from her husband's property.³

But it is held that the husband's occupation and cultivation of his wife's lands with her assent may be considered as bestowed for the common benefit of the family, or so as to give him the right to the products of his own toil like that of any tenant;⁴ and that where his own skill and service were the chief source of emolument, the wife ought not to claim all as her own against him.⁵ Moreover, if by contract express or implied the wife is indebted to her husband for his services as managing agent, it is held that she is subject to garnishment at the instance of his creditors.⁶

§ 281. **Husband as Managing Agent; Gift or Compensation; Husband's Creditors.**—Where the question arises, then, whether the husband is enjoying the wife's property by way of gift from her, or as her managing attorney, it must be determined by evidence. In either case the advantage seems to be with husband and wife in all controversies with the creditor. The general rule still prevails, however, that money transactions between husband and wife should be free from fraud, and not prejudicial to pre-existing creditors of the husband. The presumptions are not equally balanced in the different States. But presumptions of a gift from the wife are not to be strongly favored where the husband is held out to others as her agent.⁷ So gifts of income would be more readily presumed than gifts

¹ *Hodges v. Cobb*, 8 Rich. 50. But see *Penn v. Whiteheads*, 12 Gratt. 74.

² *Rush v. Vought*, 55 Penn. St. 437; *Boss v. Gomer*, 23 Wis. 284; *Merrick v. Plumley*, 99 Mass. 566; *Gage v. Dauchy*, 34 N. Y. 293; *Hazelbaker v. Goodfellow*, 64 Ill. 238; *Feller v. Alden*, 23 Wis. 301.

³ *Burcher v. Ream*, 68 Penn. St. 421. See *Dean v. Bailey*, 60 Ill. 481, as to the liability of a farm and stock, where

the husband's control is not of a character inconsistent with the common interests of himself and wife.

⁴ *Elijah v. Taylor*, 37 Ill. 247.

⁵ *Glidden v. Taylor*, 16 Ohio St. 509.

⁶ *Keller v. Mayer*, 55 Ga. 406.

⁷ See *Wales v. Newbould*, 9 Mich. 45; *Miller v. Edwards*, 7 Bush, 394; *Patten v. Patten*, 75 Ill. 446; *Aldridge v. Muirhead*, 101 U. S. Supr. 397.

of capital. Her title is generally open to inspection, and may be challenged for fraud. In New Hampshire it is held that the wife may lease her separate property to her husband.¹ And the rule is recognized under the statutes of many States, though in other States denied, that she may bestow her separate estate upon him either by way of loan or gift.² His promissory notes given for a loan from her may be enforced against him or his estate.³ But it is fair to say that whenever she gives her property to him without agreement for any repayment, but for investment in his business, and to afford him credit with the world, and he so invests it with her knowledge and acquiescence, or takes title to real estate in his own name with her acquiescence for a similar purpose, his *bona fide* creditors ought not, especially when his time and energies were of essential value to it, and changes of material or investment are such as to render identification of the property as her's impossible, to suffer afterwards, who had relied upon this capital, because of her attempt to recall the gift when she finds him embarrassed; not even a special partner would have a right to do so.⁴

Furthermore, an investment, by the husband, of the wife's separate means and property, whether in purchasing real estate or personal property for her separate use, is valid, if the rights of creditors be not thereby impaired.⁵ But where he purchases real estate or other property, and procures the title

¹ *Albin v. Lord*, 39 N. H. 196; *supra*, § 271.

² *Hinney v. Phillips*, 50 Penn. St. 382; *Fox v. Jones*, 1 W. Va. 205; *White v. Callinan*, 19 Ind. 43; 2 Kent Com. 111, and cases cited, last ed.; *Johnston v. Johnston*, 1 Grant, 468; *Gage v. Dauchy*, 28 Barb. 622; *Roper v. Roper*, 29 Ala. 247. See *Postnuptial Settlements*, Part VII. *post*.

³ *Logan v. Hall*, 19 Iowa, 491; *Bryant v. Bryant*, 3 Bush, 155.

⁴ See *Kuhn v. Stansfield*, 28 Md. 210; *Wortman v. Price*, 47 Ill. 22; *Mazouck v. Iowa Northern R. R. Co.*, 31 Iowa, 559; *Guill v. Hanny*, 1 Ill. App. 490; *Lichtenberger v. Graham*, 50 Ind. 288; *Brooks v. Shelton*, 54 Miss.

358; *Mathews v. Sheldon*, 58 Ala. 186; *Besson v. Eveland*, 26 N. J. Eq. 468; *Kaufman v. Whitney*, 50 Miss. 108. The wife may be her husband's creditor in bankruptcy. *In re Blandin*, 1 Lowell, 548.

As to the wife's gratuitous undertaking to subject her property to her husband's debts, her Pennsylvania rule is that equity will not enforce it, but leave the parties to their legal remedies. *White's Appeal*, 86 Penn. St. 134. The husband's own waiver of a statute exemption for the wife's benefit will not aid his creditors against her. *Hess v. Beates*, 78 Penn. St. 429.

⁵ *Jackson v. Jackson*, 91 U. S. Supr. 122.

in his wife's name or in trust for her, when largely indebted, the validity of the transfer and its good faith may well be called in question, especially if the means were not clearly furnished from her separate estate.¹

§ 282. **Husband as Managing Agent; Fraud on Husband's Creditors.** — Distinctions on this last point run very closely. As a broad principle the wife's separate property cannot be taken for her husband's debts or subjected to the demands of his creditors apart from her consent. The wife may enjoin an execution in favor of her husband's creditors, levied on her separate property.² She may avail herself of the equity doctrine of resulting trusts, where the title to her invested property has been taken, without her concurrence or default, in his name.³ Reduction into possession is not favored as formerly, to exclude her rights in her personal property.⁴ His possession and control of the property must, to avail himself or his creditors, be a proprietor's control, and not in any trust capacity for her sole benefit.⁵ Any transfer from husband to wife must be a completed one, in order absolutely to prevail.⁶ It is admitted, moreover, in many States, that the wife may buy her husband's property, or, instead, receive it as a gift from him;⁷ and the fact that the husband uses and enjoys some of the benefits of the wife's separate property, and out of it procures the means for the support of his family (a consequence almost inevitable where matrimonial confidence prevails in the household, even though the wife be rich), and consistently, with their common interests, does not render such property liable for the debts of the husband.⁸ Yet the credit the husband may thence derive for his own

¹ See Postnuptial Settlements, Part VII.; *Eldred v. Drake*, 48 Iowa, 569; *Davidson v. Lanier*, 51 Ala. 318; *Bowser v. Bowser*, 82 Penn. St. 57; *Snow v. Paine*, 114 Mass. 520; *Hearn v. Lander*, 11 Bush, 669.

² *Brevard v. Jones*, 50 Ala. 221. And see *Barclay v. Plant*, 50 Ala. 509.

³ Postnuptial Settlements, Part VII. Statutes sometimes extend this equitable right of the wife's. *Brooks v. Shelton*, 54 Miss. 353; *Friedlander v. Johnson*, 2 Woods, 675.

⁴ *Supra*, §§ 152-159; *Schmidt v. Holtz*, 44 Iowa, 446; *Sumner v. McCray*, 60 Mo. 493.

⁵ *Nicholas v. Higby*, 35 Iowa, 401. *Aliter* in Kentucky. *Penn v. Young*, 10 Bush, 626.

⁶ *Bowen v. Amsden*, 47 Vt. 569; *Wheeler v. Wheeler*, 43 Conn. 503.

⁷ See Postnuptial Settlements, &c., Part VII.

⁸ *Blood v. Barnes*, 79 Ill. 437; *Yale v. Dederer*, 68 N. Y. 329; *Primmer v. Clabaugh*, 78 Ill. 94.

business transactions should be well considered where his creditors sue; and it is held upon high authority that purchases of real or personal property, made during coverture by the wife of an insolvent debtor, should be suspiciously regarded and not allowed to prevail in contests between his creditors and her, unless she can show that she paid *bona fide* from her separate means.¹

§ 283. **Husband's Fraud upon the Wife as to her Separate Property; Wife's Title protected.** — While the wife may avoid a fraud upon her as against all who participated therein, it is a rule that a valuable creditor's rights cannot be prejudiced by any duress, menace, or other misbehavior of the husband, which procured them the wife's security, if it was without such creditor's instigation, knowledge, or consent.² It is otherwise if the latter's instigation, knowledge, or consent appear.³ But when the husband makes a void transfer as his wife's trustee, it is held that she can follow the investment into other hands.⁴ Or she may have him removed from his trusteeship for suitable cause.⁵

A husband has no right to agree secretly with the purchaser of his wife's separate property for a portion of the real consideration, understating the nominal consideration to the wife; for this is a breach of faith as agent or trustee.⁶ Fraud, coercion, abuse of marital confidence, can be alleged by the wife against an unworthy husband in support of her title, whether she transferred absolutely, or as security for his debts.⁷

A negotiable instrument executed by or taken in the name of a trustee of a married woman will be regarded in equity as manifesting the trust for her benefit.⁸ Even promissory notes taken in the husband's name are open to explanation;

¹ *Seitz v. Mitchell*, 94 U. S. Supr. 580. The uncorroborated testimony of the spouses themselves, on such an issue, are not to be favored. *Besson v. Eveland*, 26 N. J. Eq. 468.

² *Childs v. McChesney*, 20 Iowa, 431; *Edgerton v. Jones*, 10 Minn. 427; *Nelson v. Holly*, 50 Ala. 8; *Singer Man. Co. v. Rook*, 84 Penn. St. 442; *Marston v. Brittenham*, 76 Ill. 511; *Conn. Life Ins. Co. v. McCormick*, 45 Cal. 480; *Hull v. Sullivan*, 68 Ga. 126.

³ *Line v. Blizzard*, 70 Ind. 28; *Has- kit v. Elliott*, 58 Ind. 493.

⁴ *George v. Ransom*, 14 Cal. 658.

⁵ *Rainey v. Rainey*, 35 Ala. 282. So with any other trustee of her separate property. *Johnson v. Snow*, 5 R. I. 72.

⁶ *Beaudry v. Felch*, 47 Cal. 183.

⁷ *Sharpe v. McPike*, 62 Mo. 300; *Darlington's Appeal*, 86 Penn. St. 512.

⁸ *Lewis v. Harris*, 4 Met. (Ky.) 353.

and evidence *aliunde* may show that they belonged to the wife's separate property.¹ Subject, perhaps, to equities of *bona fide* third parties for consideration, without notice of the trust in strong instances, the wife's rights are protected in equity against her husband's misdealings with her fund.² And if a husband holds a legal title to land in trust for his wife or family, his sale and transfer of the proceeds to other land, taken without due consent in his own name, will not enable his general creditors to seize and appropriate it for his debts.³

§ 284. **Husband's Use of Income of Wife's Separate Property.**—Certain States, following the English equity doctrine, avoid close inquisition into the husband's management of his wife's property, by limiting the time during which the husband's receipt of the rents, profits, or income shall charge him.⁴ It is held, too, that a wife, by allowing her husband for a long series of years to appropriate to his own use, or their joint use, the income of her separate estate, forfeits her right to compel him to account, until at all events she revokes such permission, and then only from the date of revocation;⁵ a rule desirable for preserving domestic peace, and ensuring the husband's estate after death against dubious claims; for otherwise, as we have intimated, and apart from the wife's delay, or her presumed assent to household expenses or to a gift to her husband, and after deducting his charge for services, the husband, where regarded as purely an agent, is obligated to account. But even admitting the income his, he may show and execute an intention of preserving such income as his wife's separate property.⁶

§ 285. **Conclusion as to Husband's Dealings with Wife's Separate Property.**—On the whole there is and must be, through-

¹ *Buck v. Gilson*, 37 Vt. 653; *Conrad v. Shomo*, 44 Penn. St. 193; *Baker v. Gregory*, 28 Ala. 544; *Fowler v. Rice*, 31 Ind. 258.

² See *supra*, p. 329; *Moulton v. Haley*, 57 N. H. 184.

³ *Shippen's Appeal*, 80 Penn. St. 391; *Porter v. Caspar*, 54 Miss. 359; *supra*, §§ 200, 219, 232, 278; *McConnell v. Martin*, 52 Ind. 434.

⁴ One year from date of such receipt is the Mississippi limitation. *Hill v. Bugg*, 52 Miss. 397.

⁵ *Lyon v. Green Bay R.*, 42 Wis. 548; *Reeder v. Flinn*, 6 Rich. 216; *Lishey v. Lishey*, 2 Tenn. Ch. 5.

⁶ *Gill v. Woods*, 81 Ill. 64; *Patten v. Patten*, 75 Ill. 446; *Bongard v. Cora*, 82 Ill. 19.

out this transition period, conflict in the authorities as to the effect of a husband's receiving the proceeds of his wife's share in inherited property, or of some sale or investment in her sole right; States which abide by the common law of coverture inclining to sustain his ancient right of reduction into possession, and presuming in his favor;¹ and States, on the other hand, under the impress of the new legislative policy, reserving her title, unless she plainly and voluntarily divests herself of separate rights.²

§ 286. **Married Woman as Trustee.** — Where a married woman as trustee wastes the trust estate, English practice recognizes remedies against her separate property.³ Appointing a married woman trustee may be considered objectionable (apart from equity rules of constructive trust) while the law yet fails to divest her of all coverture disabilities, so as to make her both efficient and responsible in the legal sense. Yet it is held in some States that a married woman may, under the statutes, hold an estate in trust, and make contracts accordingly.⁴

§ 287. **Tendency of Statutes to treat Married Woman like a Single One as to her Property.** — There is now little or no limit upon the wife's legal capacity to bind her statutory estate to the discharge of liabilities created on account thereof, in Ohio,⁵ Wisconsin,⁶ Massachusetts,⁷ New York,⁸ Illinois,⁹ and some other States.¹⁰ In Illinois it is said that capacity to make contracts respecting her separate property is an implication of law and not of equity, and consequently all contracts made by her within the scope of that legal capacity are legal contracts and cognizable in the courts of law.¹¹

§ 288. **Estoppel as to Wife with Separate Property.** — As a natural result of the first modern innovations upon the cover-

¹ *Reade v. Earle*, 12 Gray, 423; *Windsor v. Bell*, 61 Ga. 671; *Nevius v. Gourley*, 95 Ill. 206; *Jacobs v. Hessler*, 113 Mass. 157.

² *Niasley v. Heisey*, 78 Penn. St. 418; *Penn. v. Young*, 10 Bush, 626; *Moyer's Appeal*, 77 Penn. St. 482.

³ *Pemberton v. McGill*, 1 Dr. & Sm. 266.

⁴ *Springer v. Berry*, 47 Me. 330.

⁵ *Patrick v. Littell*, 86 Ohio St. 79.

⁶ *Kouskop v. Shontz*, 61 Wis. 204.

⁷ *Knight v. Thayer*, 125 Mass. 25.

⁸ *Supra*, §§ 207, 256, 258.

⁹ *Re Kinkead*, 3 Biss. 405.

¹⁰ *Wells v. Caywood*, 3 Col. 487.

¹¹ *Williams v. Hugunin*, 69 Ill. 214.

ture theory, it may be observed that estoppel does not work against a married woman so readily as against persons *sui juris*. A married woman cannot be debarred of rights of separate property by estoppel *in pais*.¹ Covenants to a deed of land will not, as a rule, estop her from setting up an after-acquired title, if the title were defective.² Parties may be misled to their injury by her statements and yet have no redress.³ But in various recent instances it is held, and justly too, that where married women make agreements by fraudulent means with reference to their separate property, and thus obtain inequitable advantages, a court of chancery will hold them estopped from setting up and relying on their coverture to retain the advantage.⁴ After a conditional judgment in suitable foreclosure proceedings, a wife cannot show that the mortgage deed was void for want of the husband's assent.⁵ And the present rule, of some States, whose statutes tend to make the married woman essentially a *feme sole*, is to create an estoppel against the wife and her subsequent grantees, to the same extent as if she were unmarried, so that an after-acquired title under her warranty will enure to the purchaser's benefit.⁶

A wife is not estopped from setting up usury in defence to the same extent as her husband.⁷ Estoppel may sometimes be well applied in equity against a married woman to prevent her from relying upon coverture in order to retain the inequitable advantage of a transaction,⁸ or for denying her own title,⁹ or where she has deliberately lied as an inducement to the consideration.¹⁰ And the wife's acts and conduct under

¹ Bemis v. Call, 10 Allen, 512. But see Anderson v. Armstead, 69 Ill. 452.

² Barker v. Circle, 60 Mo. 258.

³ Klein v. Caldwell, 91 Penn. St. 140.

⁴ Patterson v. Lawrence, 90 Ill. 174; Coolidge v. Smith, 129 Mass. 554.

⁵ Freison v. Bates College, 128 Mass. 464.

⁶ Knight v. Thayer, 125 Mass. 25; King v. Rea, 56 Ind. 1. But see Barker v. Circle, 60 Mo. 258. The wife's acceptance of a deed with its reservations, and the assumption of an incumbrance upon it, may be inferred from such facts

as knowing on her part, soon after the deed was recorded, that the land had been conveyed to her, and claiming to be owner, so that she cannot afterwards deny knowledge of its recitals. Coolidge v. Smith, 129 Mass. 554.

⁷ Campbell v. Babcock, 27 Wis. 512.

⁸ Patterson v. Lawrence, 90 Ill. 174; Levy v. Gray, 56 Miss. 318; Meiley v. Butler, 26 Ohio St. 535.

⁹ Norton v. Nichols, 35 Mich. 148; Nixon v. Halley, 78 Ill. 611.

¹⁰ Read v. Hall, 57 N. H. 482.

suitable circumstances will estop her from denying to others that her husband was her agent in the management of her property.¹

§ 289. *Proceedings for charging Wife's Separate Estate with Debts, &c.* — The married women's acts in some States make, as might be anticipated, a radical change in the character of the practice for reaching the wife's separate property.

According to the English practice, and that prevalent now or formerly in most States, there was no personal judgment against a married woman. But a chancery decree was directed against the separate property of the wife, declaring the separate estate vested in the wife at the date of the decree, which it was within her power to dispose of, chargeable with the payment of the debt.² The debt was not a lien upon the wife's separate estate until made so by decree of the court of equity, and the lien was by virtue of such decree.³ Under such proceedings there was only a sort of equitable execution, the decree reaching only property which the wife had power to bind, and no personal judgment being awarded against her, — nothing from which direct personal liability on her part could be predicated.

But under the recent married women's legislation the same judgment is required, with the same process for its enforcement, as would be awarded if the woman were sole; saving, perhaps, the usual exemptions, and treating the wife's property in such case substantially as the husband's property might be treated were the judgment rendered against him and the liability his. And where such is the practice, no equitable circumstances can usually be alleged, calling for the intervention of a court of equity.⁴ Legal attachment on mesne pro-

¹ *Griffin v. Ransdell*, 71 Ind. 440; *Md.* 349; *Gage v. Gates*, 62 Mo. 412. *Anderson v. Armstead*, 69 Ill. 452. A creditor cannot procure an *interim*

² *Johnson v. Gallagher*, 3 De G. F. & J. 520; *Picard v. Hine*, L. R. 5 Ch. App. 274; *Collett v. Dickenson*, L. R. 11 Ch. D. 687; *Davies v. Jenkins*, L. R. 6 Ch. D. 730; *Patrick v. Littell*, 36 Ohio St. 79; *Armstrong v. Ross*, 20 N. J. Eq. 109.

³ *Armstrong v. Ross*, 5 C. E. Green, 109; *supra*, §§ 241, 246; *Terry v. Hammonds*, 47 Cal. 82; *Wilson v. Jones*, 46

⁴ *Stevens v. Reed*, 112 Mass. 515;

Patrick v. Littell, 36 Ohio St. 79; *Cookson v. Toole*, 69 Ill. 515; *Andrews v. Monilaws*, 15 N. Y. Supr. 65.

cess, or by way of legal execution against a married woman may be made under such statutes;¹ or in appropriate instances the foreign attachment or trustee process applied.² Even upon her covenants the wife may, in some States, be sued like a single woman.³

On the whole, policy still disinclines to permit a personal judgment to be rendered against a married woman even on what purports to be her personal obligation.⁴ The subjection of the wife's property, furthermore, under these acts, extends to all her statutory separate estate, or, as might generally turn out, by the changing of equitable into statutory estates by operation of legislation, all her separate property. And by this means the old distinction between the real and personal separate estate becomes well-nigh obliterated.⁵

¹ See language of Hoar, J., in *Wilard v. Eastham*, 15 Gray, 328.

² *Powers v. Totten*, 42 N. J. L. 442.

³ *Worthington v. Cooke*, 52 Mo. 207.

⁴ See *Norton v. Meader*, 4 Sawyer, 608; *Mallett v. Parham*, 52 Miss. 921; *Miner v. Pearson*, 16 Kan. 27; *Richards v. O'Brien*, 64 Ind. 418; *Andrews v. Monilaws*, 15 N. Y. Supr. 65; ch. 7, *post*.

⁵ *Patrick v. Littell*, 38 Ohio St. 79.

A judgment against the husband upon the joint promissory note of himself and wife does not merge the right to charge the wife's separate estate with the payment of the note in a subsequent action. *Avery v. Vansickle*, 35 Ohio St. 270. Coverture is in general, like infancy, a matter of defence which the married woman may plead or not; it need not be set up by a plaintiff. *Smith v. Dunning*, 61 N. Y. 249; *Aetna Ins. Co. v. Baker*, 71 Ind. 102. After judgment the defence of coverture cannot be interposed to prevent the sale of a married woman's property on the execution. *McDaniel v. Carver*, 40 Ind. 250.

A married woman, though not liable in the action, may charge her separate estate by directing her attorney to allow judgment to be taken against her; and the acts of her counsel, in the absence of fraud, should bind her. *Palen v. Starr*, 14 N. Y. Supr. 422;

Glover v. Moore, 60 Ga. 189; *Vick v. Pope*, 81 N. C. 22. Judgment against a married woman is not the less conclusive because rendered as part of a compromise arrangement. *Lewis v. Gunn*, 68 Ga. 542. Her gross laches, too, or her negligence, as in defaulting after a personal service, should disable her from maintaining a bill in equity to set the adverse judgment aside. *Wilson v. Coolidge*, 42 Mich. 112; *Landers v. Douglas*, 40 Ind. 522. Or from collaterally attacking it. *Burk v. Hill*, 55 Ind. 419. But American practice is not agreed as to the validity of a judgment against a married woman. Some States hold that such a judgment is absolutely null and void unless the record shows it to be within the special cases authorized by law, so that proceedings to enforce it may be stayed by injunction. *Cary v. Dixon*, 51 Miss. 563. Other decisions favor setting judgment aside on appeal or review, where the cause of action was unsuitable. *Swing v. Woodruff*, 41 N. J. L. 469; *Emmett v. Yandes*, 60 Ind. 548. Practice requiring husband and wife to be sued together, an execution, it is held, must issue against the husband, and be returned unsatisfied, before the wife's estate can be held liable. *Berger v. Clark*, 79 Penn. St. 340. But in some States the husband is treated as a for-

§ 290. *The English Married Women's Property Act of 1870.* — In England the married women's property act of 1870, with its later amendments, indicates some change of parliamentary policy in the same practical direction. But the English courts still incline, as would the American under statutes of dubious import, to render the separate property of the wife liable by subjecting her to the ordinary process of law and equity.¹ The wife cannot be sued alone in respect of her separate estate in the common-law courts, under the act of 1870, for the price of goods sold her during coverture, but, as formerly, the husband must be joined.²

It is held, under the English statute, that where husband and wife join in signing a joint and several promissory note, though for money lent him, and the husband becomes bankrupt, the wife's separate estate must be held liable.³

CHAPTER VI.

THE WIFE'S PIN-MONEY, SEPARATE EARNINGS AND POWER TO TRADE.

§ 291. *The Wife's Pin-Money ; its Nature and Origin.* — The wife's pin-money constitutes a feature of English marriage settlements in modern times. Pin-money may be defined as a certain provision for the wife's dress and pocket, to which there is annexed the duty of expending it in her "personal apparel, decoration, or ornament."⁴ It differs from the wife's

mal, not a substantial, party. *Ross v. Linder*, 12 S. C. 592.

After-acquired property may be taken upon a judgment against the wife rendered upon a legal contract. *Van Metre v. Wolf*, 27 Iowa, 841. A married woman is not bound by her answer in chancery made jointly with her husband. *Kerchner v. Kempton*, 47 Md. 568. See *Robinson v. Trofitter*, 109 Mass. 478.

¹ *Ex parte Holland*, L. R. 9 Ch. App. 307.

² *Hancocks v. Lablache*, 26 W. R. 402; *Davies v. Jenkins*, L. R. 6 Ch. D. 728. See *Noel v. Noel*, L. R. 18 Ch. D. 510. The right of counter-claim on the wife's behalf, in place of the former cross-bill, is now admitted under English practice. *Hodson v. Mochi*, L. R. 8 Ch. D. 569.

³ *Davies v. Jenkins*, L. R. 6 Ch. D. 728.

⁴ Per Lord Langdale, *Jodrell v. Jodrell*, 9 Beav. 45; *Howard v. Digby*, 2 Cl. & Fin. 654.

separate estate in being a gift subject to conditions, and not at her absolute disposal. It differs from her *paraphernalia* in being subject to her control during marriage, and not awaiting the husband's death.¹

Upon a somewhat enlarged construction, pin-money is in the nature of an annuity to pay the wife's ordinary personal expenses; and is rather the privilege of the wealthy than the poor. A person in an humble station of life pays his wife's bills as he pays his own. A person in a station rather higher is accustomed to make, for common convenience, an allowance to his wife of so much for housekeeping expenses, if she takes charge of them, and so much over for her own dress and the dress of the children. A person in a still higher station makes a general arrangement, which probably extends over years, if not over the whole coverture. But a person in a yet more elevated station makes a special stipulation by the marriage settlement, which is, as it were, saying, "You, the wife, shall not be reduced to the somewhat humiliating necessity of disclosing to me every want of a pound to keep in your pocket, or of taking my pleasure and obtaining my consent every time you want to go to the milliner's shop to order your dress; but you shall have so much, consistent with my estate and my income, which you shall retain apart from me and exempt from my control." And this supply, as Lord Brougham remarks, is the wife's pin-money.²

The exact period when pin-money was first introduced into England is not known. Lord Brougham inclines to ascribe it to the feudal times.³ But there is equally good authority for fixing the date at the Restoration; and the lawyers resort to Addison's "Spectator" in proof of the latter supposition.⁴ The popular name of this provision scarcely suggests its real significance; for, so far from being a petty allowance, it is often of the most liberal amount imaginable.⁵

§ 292. *The Wife's Pin-Money; its Incidents.* — The subject

¹ Macq. Hus. & Wife, 818; Peachey Mar. Settl. 298; Part VIII. *post*.

² Howard v. Digby, 2 Cl. & Fin. 654.

³ *Ib.* 676.

⁴ Spectator, 295. See Peachey Mar. Settl. 800; Sugd. Law Prop. 165.

⁵ In one reported English case, by no means recent, £13,000 a year was secured to the wife as her pin-money. See 2 Russ. 1, and *n.* to Macq. Hus. & Wife, 818.

of the wife's pin-money seems to have received little attention in this country.¹ And in England few cases of the sort have ever arisen. It is found more convenient in marriage contracts to settle a certain allowance upon the wife by way of separate estate, which allowance is subject to the usual incidents of separate property. Decisions as to pin-money and separate estate are frequently confounded.²

The leading English case on this subject is *Howard v. Digby*, which went to the House of Lords in 1834, and whose main decision was to the effect that the personal representatives of the wife could not recover arrears.³ The correctness of its principle has been questioned by some writers.⁴ In general, the usual equity rule against claiming more than one year's arrears appears to apply to separate estate and pin-money alike.⁵ In other ways, too, the wife's claim may be barred.⁶

§ 293. *The Wife's Housekeeping Allowance, &c.* — The wife was formerly supposed also to gain a title to savings out of her housekeeping allowance.⁷ So where the husband allowed the wife to make profit of butter, eggs, poultry, and other farm produce, which allowance he called her pin-money, it was held that she acquired a separate ownership therein.⁸ But these cases rest upon questionable authority.⁹ And more recently it has been decided that, where the wife of a farmer, with his knowledge and sanction, deposited the produce of the surplus butter, eggs, and poultry with a firm in her own name, and he called it "her money," and on his death-bed gave his executor directions to remove the money, and do the best he could with it for his wife, such evidence was insufficient to establish a gift between them, and that the husband had made neither the firm nor himself trustee for his wife.¹⁰

¹ But see *Miller v. Williamson*, 5 Md. 219.

² See Lord Brougham, in *Howard v. Digby*, 2 Cl. & Fin. 670, commenting upon 2 Roper *Hus. & Wife*, 183. In this case the whole subject receives ample discussion.

³ 2 Cl. & Fin. 670.

⁴ Sugd. *Law Prop.* 170. See *Peachey Mar. Settl.* 307; *Macq. Hus. & Wife*, 319, n.

⁵ See *Peachey Mar. Settl.* 308, and cases cited.

⁶ *Arthur v. Arthur*, 11 Ir. Eq. 511.

⁷ *Paul Neal's Case*, *Prec. in Ch.* 44, 297. But see *Tyrrell's Case*, *Freem.* 304.

⁸ *Slanning v. Style*, 8 P. Wms. 337.

⁹ See *Macq. Hus. & Wife*, 320.

¹⁰ *Mews v. Mews*, 15 Beav. 529. See *McLean v. Longlands*, 5 Ves. 78, cited herein with approval. And see *Rider*

In all cases of this sort the husband's permission, he not having deserted her, constitutes an important element of the wife's title. And the mere fact that a wife is in the use and enjoyment of clothing, or other personal property, is held insufficient to establish her right to a separate estate therein.¹

§ 294. *Wife's Earnings; the Rule with Statutory Changes.*—Indeed, the well-settled principle, both of law and equity, is that, in absence of a distinct gift from the husband, all the wife's earnings belong to him and not to herself.² But by recent statutes, enacted in many of the United States, married women are allowed the benefits of their own labor and services when performed, or even contracted to be performed, on their sole and separate account, free from all control or interference of a husband.³ The English married women's act of 1870, moreover, recognizes the wife's right to her separate earnings.⁴ These statutes vary somewhat in their terms. Thus, by a Maryland statute, the amount she may so acquire is limited to one thousand dollars over and above her debts. Statutes sometimes discriminate so as to protect simply the wife's earnings derived from labor for another than her husband.⁵

The presumptions here concerning the wife's title to her earnings seem to be much the same as in other separate property purporting to belong to her.⁶ Questions of identity, too, in tracing an investment of earnings, are applicable, as in other cases of separate property. There is, however, apparently less favor shown by our courts to the legislative grant of separate earnings, than to that of acquisitions to a wife's separate use from other sources; and still less, as we

v. Hulse, 33 Barb. 264, for a similar American decision.

¹ *State v. Pitts*, 12 S. C. 180. But cf. *supra*, § 151; *Paraphernalia*, *post*.

² For the old common-law rule, see *supra*, §§ 147, 149; *Jones v. Reid*, 12 W. Va. 350; *Douglas v. Gausman*, 68 Ill. 170; *Kelly v. Drew*, 12 Allen, 107; *Glaze v. Blake*, 56 Ala. 379.

³ See latest statutes of New York, Massachusetts, Rhode Island, Maryland, Kansas, and California. And see *Cooper v. Alger*, 51 N. H. 172; *Fowle*

v. Tidd, 15 Gray, 94; *Tunks v. Grover*, 57 Me. 586; *Meriwether v. Smith*, 44 Ga. 541; *Berry v. Teel*, 12 R. I. 267; *Attebury v. Attebury*, 8 Oreg. 224; *Larimer v. Kelley*, 10 Kan. 298; *Jasoy v. Delius*, 65 Ill. 469; *Whitney v. Beckwith*, 31 Conn. 596.

⁴ *Supra*, § 203; *Lovell v. Newton*, L. R. 4 C. P. D. 7.

⁵ *Snow v. Cable*, 19 Hun, 280.

⁶ *Raybold v. Raybold*, 20 Penn. St. 308; *Elliott v. Bently*, 17 Wis. 591; *Laing v. Cunningham*, 17 Iowa, 510.

shall soon see, to statutes extending the wife's right of acquiring earnings to a permission to embark in business on her own account. The presumption is said to be, that a wife's services, rendered even to her own mother on a basis of compensation, were given on the husband's behalf.¹ And where the proceeds of her earnings have been so mixed up with her husband's property as not to be easily distinguishable, the disposition is to regard the whole as belonging to the husband.² The idea, moreover, is not favored, of permitting a wife to forsake the matrimonial domicile, or neglect her household duties, without her husband's consent, for the purpose of acquiring earnings for her separate use, especially if her husband be still legally bound to support her by his own labor.³ It may be added that, in general, statutes which authorize married women to hold property acquired by gift, grant, or purchase, from any person other than the husband, do not carry the wife's earnings by implication.⁴

§ 295. *Wife's Earnings; the Usual Rule apart from Statute.*—Independently, therefore, of statutes which plainly secure to married women their separate earnings under the circumstances, it is held that an agreement between the wife, with the knowledge and consent of her husband, and a third person, for nursing and attention, the stipulation being that she shall be paid what her services are reasonably worth, gives to the wife no title as against her husband,⁵ nor right to maintain her separate action.⁶ Nor does equity raise a resulting trust in the wife's favor, where she contracted, with the consent of her husband, for the purchase of a lot of land, conveyed to him, though she paid off the mortgage, given for

¹ *Morgan v. Bolles*, 36 Conn. 175.

² *Quidort v. Pergaux*, 3 C. E. Green, 472; *McCluskey v. Provident Institution*, 103 Mass. 300; *Kelly v. Drew*, 12 Allen, 107.

³ *Douglas v. Gausman*, 68 Ill. 170; *Mitchell v. Seitz*, 94 U. S. Supr. 580.

⁴ *Rider v. Hulse*, 33 Barb. 264; *Hoyt v. White*, 46 N. H. 45; *Merrill v. Smith*, 37 Me. 394; *Grover v. Alcott*, 11 Mich. 470; *Baxter v. Prickett*, 27 Ind. 490; *Bear v. Hays*, 36 Ill. 280.

But see *Duncan v. Cashin*, L. R. 10 C. P. 554.

⁵ *Woodbeck v. Havens*, 42 Barb. 66. And this, even though the husband makes of his house a sort of hospital, and his wife assists him. *Reynolds v. Robinson*, 64 N. Y. 589. And see *Elliott v. Bently*, 17 Wis. 591; *Duncan v. Roselle*, 15 Iowa, 501; *McKavlin v. Bresslin*, 8 Gray, 177.

⁶ See *Beau v. Kiah*, 6 Thomp. & C. (N. Y.) 464.

part of the purchase-money, from her own earnings;¹ provided no agreement be shown, antenuptial or postnuptial, that the wife shall hold these earnings in her own right.; nor where even the deed is made out to a trustee for the wife's benefit, can she hold it against her husband's creditors.²

A crop produced on land of which the husband is lessee, by labor employed and paid by the wife, must still presumptively belong to the husband. And, on the other hand, the product of his own skill and labor on her land belongs presumptively to her as an accretion.³

§ 296. *Wife's Earnings; Gift in Wife's Favor.* — But where a statute provides that property acquired by a married woman by her personal services shall be her separate property, and exempt from liability for her husband's debts, money due for her services is protected in the same manner as if the money had been received.⁴ And even on general principles of equity, the husband may, in this country, as in England, create in his wife a separate estate in the proceeds of her own toil; the validity of such a gift, as against creditors, being subject to the same rules which apply to other voluntary conveyances;⁵ that is to say, he cannot defeat his existing creditors, but, as to creditors subsequent, may bestow, unless the gift is tainted with a fraudulent design.⁶ Such a gift on his part, once made, the husband cannot annul, by a subsequent investment of the proceeds in his own name.⁷ So where a married woman by her industry made money as a basket-maker, thus supplying her family with necessaries; and was in the habit of lending out the surplus money, and collecting it when due, with her husband's knowledge; even a court of law has liberally stretched its authority to protect her

¹ *Skillman v. Skillman*, 15 N. J. Ch. 478.

² *Campbell v. Bowles*, 30 Gratt. 652.

³ *Hamilton v. Booth*, 55 Miss. 60; *Bottoms v. Corley*, 5 Heisk. 1. But as to services as her managing agent, &c., see *supra*, §§ 277-285.

⁴ *Whitney v. Beckwith*, 31 Conn. 596.

⁵ *Pinkston v. McLemore*, 31 Ala. 308; *Neufville v. Thompson*, 3 Edw. Ch. 92; *Barron v. Barron*, 24 Vt. 375; *Richardson v. Merrill*, 32 Vt. 27; *Smart*

v. Comstock, 24 Barb. 411; *Jones v. Reid*, 12 W. Va. 350; *Glaze v. Blake*, 56 Ala. 379; *Peterson v. Mulford*, 36 N. J. L. 481. In New York, the wife's right to sue even a firm to which her husband belongs for her labor and service is maintained, under the statutes. *Adams v. Curtis*, 4 Lans. 164.

⁶ See *Postnuptial Settlements*, Part VII. *post*, where the variations of these rules are noted.

⁷ *Rivers v. Carleton*, 50 Ala. 40.

acts, on the ground of an implied agency from her husband.¹ And with the assent of all concerned, the wife has been allowed to recover compensation for her special services in taking special care of the husband's own father, who lives in the family.²

§ 297. **Wife's Earnings where Husband deserts or neglects.** — There are statutes in England and parts of this country, which give to the wife the fruits of her lawful industry, where she is deserted by her husband, or even where he grossly neglects to provide for the support of his family; and here the husband's consent to her sole employment being no element in the case, she is fairly entitled to hold the property thus acquired against all but her own creditors.³ Even were the statute equivocally expressed, presumptions of the husband's title might properly change; for besides the absence of dissent on his part, or the possible inference of an agency, we are to regard the fact that the husband is at fault, while the wife, on her part, so far from neglecting matrimonial duties or forsaking the common abode, does rather what necessity compels her to do, and therefore ought fairly to have legal protection while she remains a wife. The husband's mere absence from home, his conduct not amounting to desertion, does not, of course, afford her, of itself, such a separate privilege, unless the statute is explicit.⁴

§ 298. **Wife's Earnings; Suit, how brought.** — The husband, under some of the late enactments providing for the wife's separate earnings, is debarred from suing with or without his wife.⁵ Yet, as the wife's right depends upon her intention to exercise it, the rule is still that the husband may maintain his common-law action in his own name for his wife's earnings, if they live together and are mutually engaged in providing for the support of their family, and there is nothing to show an intention on the wife's part to separate her earnings from those of her husband.⁶

¹ *White v. Oeland*, 12 Rich. 308.

² *Mason v. Dunbar*, 43 Mich. 407.

³ *Mason v. Mitchell*, 3 Hurl. & Colt. 528; *Black v. Tricker*, 59 Penn. St. 13; *Berry v. Teel*, 12 R. I. 267; *Pursell v. Fry*, 19 Hun, 595. And see *post*, Separation, Part IX.

⁴ See *Campbell v. Bowles*, 30 Gratt. 652.

⁵ *Cooper v. Alger*, 51 N. H. 172; *Tunks v. Grover*, 57 Me. 586.

⁶ *Supra*, § 149; *Birkbeck v. Ackroyd*, 74 N. Y. 356.

§ 299. Wife's Separate Trade; Earlier English Doctrine.—

The wife's power to carry on a separate trade is another topic, known long ago to the law of England; and in this respect our American legislation of the present day seems to have been somewhat anticipated. The wife's lawful power to carry on a trade on her own account, independently of her husband, like most of her other separate privileges, is founded at the common law upon contracts made with her in derogation of the husband's marital rights. It appears that a wife, desiring to go into business on her own account, makes an agreement with her husband. When the agreement is made before marriage, it will bind the husband and his creditors; when made during the coverture, it binds the husband only, and is void against his creditors.¹ This species of contract seems to have been recognized in the common-law tribunals.

If, for the purpose of enabling a married woman to carry on her separate trade, property be vested in trustees before the marriage, the wife will at law be considered their agent, and in that character will have the benefit of the property, and enjoy its increase and profits independently of her husband, and free from liability in respect of his debts.² The law here considers the wife as the agent of her own trustee, and her possession as his possession.

The question whether the trade be carried on solely by the wife, or jointly with her husband, is a question of fact for the jury. If they find that it is a joint business, the stock in trade will be subject to the husband's obligations.³ So the husband will be liable for the debts, if it appear that he participated with the wife in the benefits.⁴

§ 300. Wife's Separate Trade by Custom of London, &c.— Separate trading was also permitted the wife by the "custom of London;" and herein she was regarded as liable to

¹ Macq. Hus. & Wife, 321; 2 Bright Hus. & Wife, 292; *Lavie v. Phillips*, 3 Burr. 1783; 2 Roper Hus. & Wife, 165, 175, and cases cited. See Antenuptial and Postnuptial Settlements, Part VII. *post.*

² *Jarman v. Woolton*, 3 T. R. 618; Macq. Hus. & Wife, 321; 2 Bright Hus. & Wife, 297.

³ *Barlow v. Bishop*, 1 East, 432; Macq. Hus. & Wife, 322; 2 Bright Hus. & Wife, 297.

⁴ *Petty v. Anderson*, 2 Car. & P. 38; Macq. Hus. & Wife, 322.

arrest and imprisonment for debt without her husband, and, moreover, might be declared a bankrupt.¹ If the husband had any concern in the business, the wife was no longer to be treated as a *feme sole* in respect of it ;² and “for conformity” it was needful to join the husband in such suits, even though the wife were alone liable, being herself the substantial party proceeded against.³

§ 301. *Wife's Separate Trade not Common in England.*—Notwithstanding these provisions of the law, it does not appear that separate trading in England, prior to the innovations introduced with the married women's act of 1870, was ever very common. No modern equity cases are to be found on this subject.⁴ The difficulties in the way of establishing credit, and of negotiating securities on the wife's sole behalf, were probably found insurmountable, even though married women might be found anxious to assume the responsibilities of trade, with its incidental imprisonment for debt. The judicial evidence of this separate trading is supplied chiefly by the misfortunes such trade entailed upon the women who embarked in it. Even where the wife lived apart from her husband (a very important consideration⁵), and, having her separate estate, carried on a trade, it was doubted, in an important case of which we have spoken elsewhere, whether the tradesmen furnishing supplies had any demands upon that estate which equity could recognize.⁶

§ 302. *Wife's Separate Trade; American Equity Doctrine.*—This doctrine of the wife's power to trade comes up anew in

¹ *Beard v. Webb*, 2 B. & P. 97. See 2 Roper Hus. & Wife, 124.

² 2 Bright Hus. & Wife, 77, 78; *Lavie v. Phillips*, 8 Burr. 1776.

³ *The Liber Albus*, in the town clerk's office, stated that “where a *feme covert* of the husband useth any craft in the said city on her sole account, whereof the husband meddeth nothing, such a woman shall be charged as a *feme sole* concerning everything that toucheth the craft; and if the husband and wife be impleaded, in such case the wife shall plead as a *feme sole*; and, if she be condemned, she shall be committed to

prison till she have made satisfaction, and the husband and his goods shall not, in such case, be charged nor impeached.” 2 Bright Hus. & Wife, 77.

⁴ But see the recent cases of *Talbot v. Marshfield*, L. R. 3 Ch. 622; *Re Peacock's Trusts*, L. R. 10 Ch. D. 490; *Ashworth v. Outram*, L. R. 5 Ch. 923; *post*, § 308. See comments in *Macq. Hus. & Wife*, 323, on the cases cited in 2 Roper Hus. & Wife, 172, 173.

⁵ See *Separation, post*.

⁶ Cf. *Bruce & Turner*, Lord Justices, in *Johnson v. Gallagher*, 3 De G. F. & J. 494.

the United States of late years, with our recent policy in favor of the independence of married women. And the rule seems, apart from late legislation, to be well established in the United States, that the husband, in pursuance of a marriage contract, antenuptial or postnuptial, may confer upon his wife the right to trade for her exclusive benefit.¹ Nor have the American cases uniformly insisted upon formal contracts for this purpose between husband and wife; seemingly regarding the question as one of mutual and *bona fide* intention merely.

§ 303. **Wife's Separate Trade; American Equity Doctrine; Instances.**—Thus, the equity rule in Vermont is that the wife shall hold the result of her earnings, in every case, against the husband and his heirs, and generally against his creditors, so long as he allows her to keep the property separate from the general mass of his own estate; and this, although his own name may be used in the formal conduct of the business; unless, in the case of creditors, this should lead to a false credit on the part of the husband.² And in a recent case the stock in a millinery shop, resulting from the wife's credit and her earnings under the sanction of her husband, was treated as her separate property, and held liable for demands affecting it.³

In Virginia, a married woman owning a separate property, is allowed, on equity principles, to engage in trade with her husband's consent, either on her sole account or in partnership with a third person; and by doing so she subjects her separate estate to payment of the business debts. And, as against the husband and his creditors, she is entitled to the profits, so far, at least, as they did not accrue from labor, skill, or capital bestowed by himself.⁴

So in Michigan the wife is now permitted to keep a boarding-house as her own separate business, and upon her own account; and the same is said of other pursuits, though the

¹ *Richardson v. Merrill*, 32 Vt. 27; *Horstman*, 8 Bush, 172; *Cowan v. Tillman v. Shackleton*, 15 Mich. 447; *Mann*, 3 Lea, 229.

Wieman v. Anderson, 42 Penn. St. 811; ² Per Redfield, C J., in *Richardson v. Merrill*, 32 Vt. 27.

Duress v. Horneffer, 15 Wis. 195; *James v. Taylor*, 43 Barb. 530; *Wilt-*

haus v. Ludicus, 5 Rich. 326; *Uhrig v.* ³ *Partridge v. Stocker*, 36 Vt. 106.

⁴ *Penn v. Whitehead*, 17 Gratt. 503.

courts of that State seem disposed to restrict her to the exercise of such business as is usually carried on by females and consists largely and almost necessarily of female labor.¹ In Pennsylvania, it is decided that a wife may trade with merchandise acquired in her own right, and with the proceeds of sales buy other goods to be held and traded with, which continue exempt from seizure for her husband's debts.²

In Wisconsin, where a married woman, with the assent of her husband, engages in business as a sole trader, and contracts a debt for goods to carry it on, verbally pledging the faith of separate estate, her whole separate estate must answer for it.³ But earnings acquired from his business managed in his absence are not hers independently of his gift.⁴ And in Indiana it is said that while, as an abstract proposition, the law may not authorize a married woman to enter into a contract of partnership, yet if she does make such contract, and in pursuance thereof places her separate funds in the firm of which she is by contract a partner, such funds cannot, while there, be made subject to her husband's debts.⁵

§ 304. *Separate Trade; American Equity Doctrine; Assent of Husband, &c.* — The husband's assent is in general necessary, provided they live together; and if they do not, different considerations apply. It is held in New York that the husband's assent does not carry with it an implied authority to make an assignment for the benefit of creditors of that business;⁶ though in New Jersey a wife, who has been permitted by her husband to trade, may transfer her stock in payment of notes given for the purchase-money.⁷ And apart from statute, it would appear to be the general rule, that unless the husband's consent that the wife carry on business in her own name is based upon a sufficient consideration, he may withdraw it at any time and assert his common-law rights.⁸

¹ *Tillman v. Shackleton*, 15 Mich. 447; *Glover v. Alcott*, 11 Mich. 471.

² *Wieman v. Anderson*, 42 Penn. St. 811; *Manderbach v. Mock*, 29 Penn. St. 43. But see *Hoffman v. Toner*, 49 Penn. St. 231.

³ *Todd v. Lee*, 16 Wis. 480.

⁴ *Stimson v. White*, 20 Wis. 562.

⁵ *Mayhew v. Baker*, 15 Ind. 254.

⁶ *Cropsey v. McKinney*, 30 Barb. 47.

⁷ *Green v. Pallas*, 1 Beas. 267.

⁸ *Conklin v. Doull*, 67 Ill. 355; *Crop-*

In Indiana it is stated, in conformity with various precedents, that where a wife engages in business with the knowledge and consent of the husband, the business is regarded as that of the husband, with the wife as his agent, and he is bound for the performance of contracts which she may make relating to such business;¹ but that where the wife incurs the indebtedness, and the credit is given to her exclusively, and where, therefore, there can be no presumption that she was acting merely as the agent of the husband, the husband is not liable.²

§ 305. *Separate Trade; American Equity; Custom, &c.*—In Pennsylvania, and doubtless in most other States, the wife is not permitted to be a *feme sole* trader upon any temporary inability of the husband or his mere involuntary failure to support her, nor upon any theory of a mere custom, while they live together.³ But in one or two Southern States it would appear as if the London custom had been adopted and recognized within certain limits, by virtue of old local statutes or otherwise, so as to render it immaterial whether or not husband and wife live together. Thus, in South Carolina a *feme sole* trader is held bound to a third person by her indorsement to him of a note drawn by her husband payable to herself;⁴ and in that State have been numerous decisions, early in this century, requiring the wife to be engaged in trade or commerce, but permitting her to keep boarders, and so on.⁵

§ 306. *Wife's Separate Trade repudiated in some States.*—On the other hand, in North Carolina the whole doctrine of separate trading is expressly repudiated.⁶ Indeed, our earlier

sey v. McKinney, 30 Barb. 47; *Todd v. Lee*, 16 Wis. 480; *Richardson v. Merrill*, 32 Vt. 27; *Partridge v. Stocker*, 36 Vt. 108; *Penn v. Whitehead*, 17 Gratt. 508; *King v. Thompson*, 87 Penn. St. 365.

¹ 2 Bright Hus. & Wife, 300, § 20; *Jenkins v. Flinn*, 37 Ind. 349, and cases cited; *Switzer v. Valentine*, 4 Duer, 96.

² *Tuttle v. Hoag*, 46 Mo. 38; *Jenkins v. Flinn*, 37 Ind. 349, and cases cited; 5 Taunt. 356.

³ *King v. Thompson*, 87 Penn. St.

365; *Jacobs v. Featherstone*, 6 W. & S. 846. In this State there appears to have been an old statute of 1718 on the subject, as well as the later one of 1855.

⁴ *Wilthaus v. Ludicus*, 5 Rich. 326. And see *Stimson v. White*, 20 Wis. 562.

⁵ *McDaniel v. Cornwall*, 1 Hill (S. C.), 428; *Dial v. Neuffer*, 3 Rich. 78; *Newbiggin v. Pillans*, 2 Bay, 162.

⁶ *McKinnon v. McDonald*, 4 Jones Eq. 1. As to Alabama, see *Newbrick v. Dugan*, 61 Ala. 251.

American cases seem to have regarded with very little favor the doctrine that the wife, while living with her husband, could carry on a business of her own, without rendering her husband liable and subjecting her stock in trade to his debts.¹ And the same may be said, at this day, of States whose legislatures have not freely conceded the right of married women to incur great risks.²

§ 307. *Wife's Separate Trade; American Equity; General Conclusions.*—The conclusion to be drawn from this class of cases is that, modern policy having once conferred upon the wife large powers both as to the acquisition and enjoyment of separate property, as well as the right to invest and reinvest the same, including their rights under marriage settlements, married women naturally sought business opportunities with their capital; and thus the modern courts, confronted with the practical results, and aided by precedents from old local customs or old legislation, were drawn into the practical concession of trading privileges, and hence of trading liabilities, while professing to deny to the wife on general principles the right to engage in mercantile pursuits without more explicit statute provisions to that effect, and while requiring the assent of the husband to appear.

Where it is clearly for the wife's advantage to reap the benefits of her business, the disposition of the law to yield them must be strong; but where, as must often be the case, she speculates imprudently and becomes deeply involved, the court is perplexed, though doubtless anxious to relieve her. The Vermont equity rule in this respect, indicated in a former section,³ perhaps not an unreasonable one, goes beyond all the English precedents cited to support it; though in the leading Virginia and Vermont cases, and perhaps in others upon this point, we find the married woman who has subjected her property to the demands of her husband's creditors permitted to stand in equity, where the business fails, as a sort of preferred creditor, for her manifest benefit.⁴ Whether a cred-

¹ *McKinley v. McGregor*, 3 Whart. 878, and cases cited.

² *Supra*, § 308.

³ *Godfrey v. Brooks*, 5 Harring. 396; *Woodcock v. Reed*, 5 Allen, 207, *per curiam*.

⁴ *Penn v. Whitehead*, 17 Gratt. 508; *Richardson v. Merrill*, 82 Vt. 27; *Cowan v. Mann*, 3 Lea, 229. See *Bellows v. Rosenthal*, 81 Ind. 116.

itor's claim for moneys due from the wife on account of supplies to carry on the separate business, can be enforced against her, is under the rule as to a beneficial dominion set forth in our preceding chapter,¹ of at least doubtful equity;² such indebtedness must usually be pronounced void at law;³ while even equity will decline to enter a decree establishing a charge on the wife's estate, unless the husband, or some other trustee for the wife, is properly before the court.⁴

If equity, unaided by legislation, preserves the separate capital thus invested in trade, that the wife may enjoy its benefits, it is otherwise with profits which may have accrued beyond the interest of such capital. These, it is declared in various cases which regard the separate trade with disfavor, belong to the husband like other separate earnings of the wife, so as to remain liable for his debts; being in fact as much the earnings of the wife as any other income or product by her labor and skill.⁵ And, of course, the avails of the wife's labor in her husband's business belong as a rule to him, like her earnings, and property purchased therewith in her name cannot be held by her against his creditors.⁶

§ 308. *Separate Trade under Recent Statutes, &c.; English Doctrine.* — But the doctrine of a wife's separate trading is at this day to be considered under the combined influence of modern equity decisions as to the wife's *jus disponendi*, and the recent married women's acts. And first, to study these decisions from the English standpoint, the act of 1870 declares that wages and earnings of a married woman shall be her separate property.⁷ Under construction of this act, the English chancery has lately sustained the right of a butcher's wife to carry on her husband's business upon her separate resources, he being incapacitated through delirium tremens,

¹ *Supra*, § 259.

² *Johnson v. Gallagher*, 3 De G. F. & J. 494; *Copeland v. Cunningham*, 31 Ind. 116. But see *Todd v. Lee*, 16 Wis. 480; *Partridge v. Stocker*, 36 Vt. 108.

³ *Conklin v. Doul*, 67 Ill. 355.

⁴ *Ibid.*

⁵ *Jassoy v. Delius*, 65 Ill. 469; *Jenkins v. Flinn*, 37 Ind. 349, and cases

cited. But as to the husband's right to confer her earnings upon the wife when not in fraud of his creditors, see *supra*, § 296. And see *Dumas v. Neal*, 51 Ga. 563, applying the rule of the text where the wife took boarders.

⁶ *Clinton Man. Co. v. Hummell*, 25 N. J. Eq. 45.

⁷ Act 33 & 34 Vict. c. 93; *supra*, § 203.

and, while at home, offering no obstruction to her course; notwithstanding neither a positive assent to the trade on his part appeared, nor his abandonment;¹ and the apparent effect of this decision was to treat the meat the wife bought as her statutory separate property, protected as hers against her husband's debts as well as purchasable on her separate credit. Again, both under the act of 1870 and independently of it, chancery protected the widow's interest as against the husband's administrator, after his death, in a fruit-preserving business, which she had commenced while single, then continued, after her marriage in 1874, to carry on in her maiden name, her husband consenting, and not interfering with it; and, by means of her own capital and efforts, finally establishing it on a large wholesale basis.²

A partnership of two single women in England having been dissolved by the marriage of one of them, and the stock, good-will, and business having been bought in by the woman remaining single, chancery, upon the ordinary construction of such sales, refused recently to grant an injunction in favor of the married woman and her husband, who had commenced a new business together in Paris, to restrain the single woman from carrying on her business in London under the old firm style.³

§ 309. *Separate Trade under American Statutes; Requirements; Registry, &c.* — The recent married women's acts in many of the United States have enlarged and more fully established the wife's power to trade on her own account; and the profits of her business are thus secured to her sole and separate use.⁴ She is thus enabled to use her separate

¹ Lovell v. Newton, L. R. 4 C. P. D. 7. If his assent was not clearly shown to his wife's trade, there would appear to have been a pretty fair inference, from the facts, that he gave it.

² Ashworth v. Outram, L. R. 5 Ch. 923.

³ *Re Peacock's Trusts*, L. R. 10 Ch. D. 490.

⁴ Such statutes are to be found in New York, Maine, New Hampshire, Massachusetts, Connecticut, Kansas, New Jersey, Iowa, California, Wis-

consin, Illinois, Arkansas, Mississippi, and other States. And see Mitchell v. Sawyer, 21 Iowa, 582. "Free dealer" and "sole trader," are words used in this connection: Newbrick v. Dugan, 61 Ala. 251; though strict trade is not always regarded in the acts referred to. And as to *feme sole* trader, see Separation, *post*; Porter v. Gamba, 48 Cal. 105. Private acts are sometimes passed to this effect. Halliday v. Jones, 57 Ala. 525. Pennsylvania has a *feme sole* trader act not applicable to the ordinary

property; and she may even enter, in some States, into a general partnership for trade. In general, what the wife acquires under these statutes is declared to be exempt from liability for the husband's debts, and not subject to his control or interference.

But the statutes of Massachusetts require the married woman to first register her intention, thus affording a very reasonable safeguard against fraud and imposition upon the public and herself, besides requiring that the act be a deliberate one;¹ and the husband will be held liable on her contract where the certificate is not duly filed.² In Kentucky, special authority to trade must first have been conferred by the chancellor.³ Such requirements not being complied with, the creditors of the husband may come upon the assets of the business.

The wife, under such statutes, is found engaged on her separate account, as milliner and dressmaker,⁴ farmer,⁵ boarding-house keeper,⁶ army sutler,⁷ operator of a mill,⁸ saloon-keeper,⁹ tavern-keeper,¹⁰ or in whatever other business she may choose to carry on with her own capital. Even though the trade be unsuitable to her sex, fraud upon the husband's creditors will not be conclusively presumed.¹¹ But it is held that the business under such statutes should be pursued as a continuing and substantial employment. And hence the mere renting of a room or two by a married woman

case of a husband's insolvency while he remains at home. *King v. Thompson*, 87 Penn. St. 365. In Kentucky the separate trading acts are limited in this direction by judicial construction. *Moran v. Moran*, 12 Bush, 301.

¹ Mass. Stats. 1862, c. 198. This statute requirement does not apply to keeping a colt for use, nor to buying materials to build a house for the family. *Proper v. Cobb*, 104 Mass. 589. But it applies to the boarding-house business. *Harnden v. Gould*, 126 Mass. 411. And the farming business. *Snow v. Sheldon*, 126 Mass. 132. See also, as to removing to a new town, *Dawes v. Rodier*, 125 Mass. 421. It does not to other property than personal. *Bancroft*

v. Curtis, 108 Mass. 47. Nor where both spouses were not domiciled within the State. *Hill v. Wright*, 129 Mass. 296. It need not specify property. *Long v. Drew*, 114 Mass. 77.

² *Feran v. Rudolphsen*, 106 Mass. 471.

³ *Uhrig v. Horstman*, 8 Bush, 172.

⁴ *Jasoy v. Delius*, 65 Ill. 469; *Tuttle v. Hoag*, 46 Mo. 38.

⁵ *Kouskop v. Shontz*, 51 Wis. 204; *Snow v. Sheldon*, 126 Mass. 332.

⁶ *Harnden v. Gould*, 126 Mass. 411; *Dawes v. Rodier*, 125 Mass. 421.

⁷ *Swasey v. Antram*, 24 Ohio St. 87.

⁸ *Cooper v. Ham*, 49 Ind. 393.

⁹ *Nisapel v. Laparle*, 74 Ill. 306.

¹⁰ *Silveus v. Porter*, 74 Penn. St. 448.

¹¹ *Guttman v. Scannell*, 7 Cal. 465.

in the house in which she lives with her husband is not "carrying on business" within the meaning of such an act.¹

§ 310. **Separate Trade under American Statutes; Wife's Capacity for carrying it on.**—Under these American statutes permissive of the wife's separate trade, it is a general rule that the wife's contracts regarding her separate trade or business are binding on her separate property, and that the husband is not answerable for her solvency. With reference thereto she may make contracts, and sue and be sued, as if sole, except (as such statutes usually run) that where she is sued the remedy is to be enforced against her separate property only, and not against her person. She may make contracts of sale, and sue for goods sold and delivered to her customers.² The power to do business implies, too, the power to purchase goods, fixtures, and stock for it, and execute the needful instruments of purchase; and hence the wife's contracts for such purchase on credit, her notes, bills, security, or simple indebtedness therefor, must be deemed obligatory and enforceable by suit or otherwise.³ And what she thus purchases, in the exercise of her trading discretion, is to be held and treated as her sole and separate property as against her husband and his creditors.⁴ Where, too, the married woman keeps a separate bank account, with reference to such business, the check which she draws against it and the fund itself are available to her business creditors.⁵ What she borrows by way of capital to commence the business, she is required to refund.⁶

¹ *Holmes v. Holmes*, 40 Conn. 117.

² *Porter v. Gamba*, 43 Cal. 105; *Netterville v. Barber*, 52 Miss. 168; *Trieber v. Stover*, 30 Ark. 727. The contracts of married women, made by virtue of such statute capacity, should not be viewed with hesitation or suspicion by the courts, but should be fully enforced. *Netterville v. Barber*, 52 Miss. 168.

³ *Nispel v. Laparle*, 74 Ill. 306; *Kouskop v. Shontz*, 51 Wis. 204; *Dayton v. Walsh*, 47 Wis. 113; cases *infra*; *Wheaton v. Phillips*, 1 Beas. 221; *Guttman v. Scannell*, 7 Cal. 455; *Camden v. Mullen*, 29 Cal. 564; *Reading v. Mullen*, 31 Cal. 104.

⁴ *Tallman v. Jones*, 13 Kans. 438; *Meyers v. Rahte*, 46 Wis. 655; *Sammis v. McLaughlin*, 35 N. Y. 647; *Silveus v. Porter*, 74 Penn. St. 448; *Dayton v. Walsh*, 47 Wis. 113.

⁵ *Nash v. Mitchell*, 15 N. Y. *supra*, 471.

⁶ *Frecking v. Rolland*, 53 N. Y. 442. As to purchasing fixtures or real estate for carrying on the business, see *Ib.*; *Dayton v. Walsh*, 47 Wis. 113. The rule of contract liability (apart from any statute of frauds as to conveyances) is the same, whether the evidence of the wife's contract be oral or written. *Kouskop v. Shontz*, 51 Wis. 204.

§ 311. **Separate Trade under American Statutes; Selling out the Business.** — On general principles, equity will enjoin a married woman who sells out a business and its good-will, which she has carried on for her separate account, from violating her own agreement with the purchaser in restraint of future competition or interference; for in this respect a married woman should not be regarded more favorably than others who dispose of their business to *bona fide* purchasers.¹

§ 312. **Separate Trade under American Statutes; Husband's Participation.** — It follows that under such legislation the husband is not liable on the wife's contracts and liabilities incurred in the pursuit of her separate business, unless he participates in it.² But his participation will not unfrequently be found in the modern cases; and hence arises legal uncertainty, and often a suspicion of fraudulent arrangements against one another's creditors. Does the proof, we must ask, under any such circumstances, show that the wife carried on no separate trade, but was her husband's agent? or that she did, and the husband was her agent? or that they were in partnership together?

In Massachusetts, where the statutory doctrine of the wife's power to trade and acquire separate earnings has already received a considerable exposition in the courts, it is held that where a married woman carries on the business of keeping boarders on her sole and separate account, and has purchased goods to be used in her business on her sole credit, she alone is liable, although her husband lived with her when the goods were purchased; and her own acts and admissions in reference to the business, are competent evidence against her.³ In Maine the husband cannot be sued for goods and chattels furnished his wife by third persons in the course of her business, even though such purchases were made by her with his knowledge and consent, and although she appropri-

¹ *Morgan v. Perhamus*, 36 Ohio St. 517. And see *Re Peacock's Trusts*, L. R. 10 Ch. D. 490.

² *Parker v. Simonds*, 1 Allen, 258; *Colby v. Lamson*, 39 Me. 119; *Trieber v. Stover*, 30 Ark. 727; *Tuttle v. Hoag*, 46 Mo. 38.

³ *Parker v. Simonds*, 1 Allen, 258. As to husband's liability on a lease, though professing to underlet for a wife's business, see *Knowles v. Hull*, 99 Mass. 562.

ated part of the proceeds to the support of her husband and family.¹

But where the purchase and sales are made with the husband's knowledge and consent, and he participates in the profits of the business, knowing them to be such, and that she professed to act for him, it may be inferred in general that the purchases were made on the husband's credit.² Where the separate business, however, is carried on against the husband's consent and without his concurrence, he assuredly is not liable.³

§ 313. *Separate Trade under American Statutes; Husband's Participation, continued.*—In New York, as against her husband's creditors, the wife may make him managing agent and let him conduct the business in her name, while she furnishes capital from her own means and takes the profits to herself; paying the managing agent what she thinks best, without subjecting the stock in trade to his debts.⁴ So it is held that a wife, by allowing chattels belonging to her, and which remain *in specie*, to be employed by her husband in carrying on a business for their common benefit, does not devote them to her husband, so as to render them liable for his debts.⁵ The courts of that State intimate, however, that there should be no fraud in such transactions; which otherwise the reader might doubt, from finding such latitude given to the wife's business dealings. We should add that it is deemed a question of fact for the jury, whether upon evidence a business is in truth the wife's, with the husband acting merely as her agent, or this agency is a cover for the husband's business to keep his property from his own creditors.⁶ And that under some circumstances a husband's agency from the wife will be considered revoked and the business subsequently carried on for his benefit, and not hers alone.⁷

§ 314. *Separate Trade under American Statutes; Husband's Participation continued.*—All purchases or contracts of pur-

¹ Colby v. Lamson, 39 Me. 119.

² Oxnard v. Swanton, 39 Me. 125.

³ Tuttle v. Hoag, 46 Mo. 38; Jenkins v. Flinn, 37 Ind. 349. See Smith v. Thompson, 36 Conn. 107, where the married woman had no power to trade as a *feme sole*.

⁴ Buckley v. Wells, 33 N. Y. 513.

⁵ Sherman v. Elder, 24 N. Y. 331; Barton v. Beer, 35 Barb. 78.

⁶ Abbey v. Deyo, 44 N. Y. 343.

⁷ Hamilton v. Douglas, 46 N. Y. 318.

chase for commencing or prosecuting the wife's separate business must have been made in good faith and not as a means of fraudulently placing the husband's property beyond the reach of his creditors.¹ But the employment of her husband in carrying on her separate business of farming does not make him the wife's agent in the business, unless he contributed money or services as partner,² nor his employment as salesman in the wife's store,³ or as operative or manager in his wife's mill.⁴ Proof that a husband signed notes for goods in a shop leased to him is not conclusive proof that the goods did not belong to the wife's separate business;⁵ for a husband might sign as an agent and render her business liable.⁶

But transactions which are tainted with fraud upon the rights of creditors and others must not be permitted to stand. Capital placed by a wife in her husband's hands, and by him so embarked in business with her assent that credit is obtained upon it, are not, with the increase, the wife's separate property, as against his creditors who have trusted accordingly, but rather his property.⁷ A change in the mutual relations of the spouses regarding the business ought, on the usual principles of both agency and partnership, to be brought home to the knowledge of creditors with whom business relations continue uninterrupted.⁸

§ 315. **Separate Trade under American Statutes; Husband's Participation; Summary.** — Where a married woman manages a separate trade or business by agents, the usual doctrine of agency must apply. The wife cannot avoid the usual liabilities on the plea that she made her husband her agent.⁹ The scope of the agency, too, must be considered as in other cases, and the agency, as actually conferred, is not the full test of responsibility for the agent's dealings with third parties, for those clothed with apparent authority may bind their princi-

¹ *Dayton v. Walsh*, 47 Wis. 113.

² *Ibid.*

³ *Ploss v. Thomas*, 6 Mo. App. 157.

⁴ *Cooper v. Ham*, 49 Ind. 393.

⁵ *Mason v. Bowles*, 117 Mass. 86.

⁶ *Freiberg v. Branigan*, 18 Hun, 344. But as to a judgment rendered

against the agent himself, see *Smiley v. Meyer*, 55 Miss. 555.

⁷ *Patton v. Gates*, 67 Ill. 164; *Kouskop v. Shontz*, 51 Wis. 204. Or possibly like that of a firm in which both were partners. See § 316, *post*.

⁸ *Bodine v. Killeen*, 53 N. Y. 93.

⁹ *Porter v. Gamba*, 43 Cal. 105.

pals as though really authorized.¹ In short, married women, as it is well observed, to the extent and in the matters of business in which they are by law permitted to engage, owe the same duty to those with whom they deal, and to the public, and may be bound in the same manner as if they were unmarried. To the extent of their enlarged capacity to transact business as conferred by statute, they may be estopped by their acts and declarations, and made subject to all the presumptions which the law indulges against the other sex.²

And while, in general, the husband's gift may sustain the wife's claim of profits accruing from her separate trade; yet the better opinion is, upon either equity or statute consideration, that a business carried on by a husband and wife in co-operation, his labor and skill uniting with hers, must be considered as his business so far as his creditors are concerned, and fails accordingly of protection for her especial benefit;³ though it might, perhaps, be well ruled in some States, that there is a partnership whose liabilities should be adjusted on partnership principles; highly objectionable as the jurist may well regard all such partnerships upon principle.

§ 316. *Separate Trade under American Statutes; Husband and Wife as Copartners.* — As to all agencies and partnerships one rule may apply in adjusting rights as between themselves, and another as to creditors whose confidence has been invited. And, on the whole, it would still appear to be the general rule, notwithstanding the late statutes, that a wife may not, as against the world, become her husband's partner, nor even join her labor and capital to his in one and the same business enterprise.⁴ In Massachusetts, while the statute permitted the wife to form a copartnership with third parties, this exception the court so strictly enforced, as to hold her transactions as a member of any firm in which her husband was interested as a partner utterly void, whether to her advantage

¹ *Bodine v. Killeen*, 53 N. Y. 98.

Green, 883. But see *Penn v. White-*

² *Bodine v. Killeen*, 53 N. Y. 98; head, 17 Gratt. 503; *Partridge v. Parshall v. Fisher*, 43 Mich. 529; *Leland v. Collver*, 34 Mich. 418.

⁴ *Wilson v. Loomis*, 55 Ill. 352;

³ See *National Bank v. Sprague*, 5 *Montgomery v. Sprankle*, 31 Ind. 113; *C. E. Green*, 13; *Oxnard v. Swanton*, *Lord v. Parker*, 3 Allen, 127.

39 Me. 125; *Cramer v. Reford*, 2 C. E

or injury, inasmuch as a married woman cannot legally contract with her husband singly or jointly.¹

But under the New York statutes it is held that a husband and wife may not only enter into a valid partnership together for business, but carry it on under the name "A. & Co." (The "Co." representing the wife) without violating the law which forbids persons to transact business under fictitious names;² and that hence they can sue and recover in their joint names for goods sold and delivered by their firm.³ In Illinois, too, as it would appear, a wife may enter into a partnership with her husband, and when she does this it will be presumed, in the absence of different proof, that she contributed her share of the capital, and that her time, skill, and earnings went into the business; and such a partnership has been actually adjudged bankrupt.⁴ In California not only is the husband not forbidden to become a partner, but the plain intention of the Code is that he may furnish part of the capital stock. The wife may sue alone in such business, and may employ her husband to manage it.⁵ In some South-western States,⁶ separate trading seems to be permitted on similar principles.⁶

§ 817. *Separate Trade under American Statutes; Wife's Copartnership with Third Persons.* — By the wife's business copartnership with third persons, and particularly with those of the opposite sex apart from her husband, she entangles her separate property disadvantageously, and incurs the risk of personal affiliations, besides, quite perilous to domestic concord and the mutual confidence which marriage demands. In Massachusetts the legislature permitted a married woman to form a copartnership in business with third parties, though not with her husband; but, after some ten years' experience, repealed, in 1874, that permission.⁷ Most other States deny

¹ *Lord v. Parker*, 3 Allen, 127; *Edwards v. Stevens*, 3 Allen, 315; *Plumer v. Lord*, 7 Allen, 481.

² *Zimmerman v. Erhard*, 8 Daly, 311.

³ *Ibid.*

⁴ *Re Kinkead*, 3 Biss. 406. As to bankruptcy, cf. *Ex parte Holland*, L. R. 9 Ch. 307.

⁵ *Camden v. Mullen*, 29 Cal. 564; *Reading v. Mullen*, 31 Cal. 104; *Gutmann v. Scannell*, 7 Cal. 455.

⁶ See *Atwood v. Meredith*, 37 Miss. 635; *Oglesby v. Hall*, 30 Ga. 386.

⁷ *Todd v. Clapp*, 118 Mass. 495. Such a law, not being interpreted retroactively, was held constitutional *Id.*

her such a right as separate and exclusive of her husband's interest;¹ though in some parts of the Union such copartnerships are sustained,² and she is not unfrequently found connected with business firms as a partner in place of her deceased husband;³ sometimes, too, he is her successor, or else participates with her and third persons in the concern.⁴

Where a married woman enters legally into a copartnership, she becomes personally liable, to the extent of her separate property, for the partnership debts, like any other partner.⁵

In Ohio it is held that where a married woman, assuming to carry on a partnership business unconnected with her separate property, is assisted by her husband, he, and not she, is to be regarded in law as the partner; and that accordingly a firm creditor may proceed against the husband and the other members, not including the wife, even though, on dissolution of the firm, the other partners had transferred the property to her, she agreeing to pay all the firm debts.⁶ And where, again, a firm composed of two women put the husband of one in absolute charge of the business; who, with his wife's knowledge and consent made purchases on credit, and acted as if he instead of his wife were one of the partners; it was held in Michigan that the husband and the other partner must be concluded by such conduct, as to creditors having no knowledge to the contrary, and that, in absence of superior equities, such creditors might treat the firm as composed of the husband and the other woman.⁷ These decisions tend to the protection of the wife. And such, too, is the effect of a late New York decision, which, admitting that a husband might, perhaps, be deemed the partner as between the wife and himself or his creditors, rules, nevertheless, that where a married woman acting under a secret trust for her husband, becomes a member of a copartnership, she is to be regarded, as between her and her copartner, the owner of the interest she

¹ See *Bradford v. Johnson*, 44 Tex. 381; *Bradstreet v. Baer*, 41 Md. 19; *Howard v. Stephens*, 52 Miss. 289.

² See *Newman v. Morris*, 52 Miss. 402.
³ *Preusser v. Henshaw*, 49 Iowa, 41.

⁴ *Bitter v. Rathman*, 61 N. Y. 512; *Swasey v. Antram*, 24 Ohio St. 87.

⁵ *Preusser v. Henshaw*, 49 Iowa, 41;

Newman v. Morris, 52 Miss. 402.

⁶ *Swasey v. Antram*, 24 Ohio St. 87.

⁷ *Parshall v. Fisher*, 43 Mich. 529.

represents, so as to maintain proceedings for a dissolution of the copartnership and for an accounting.¹

§ 318. **Suits by or against a Married Woman carrying on Separate Trade.**—Under the statutes of some States which permit the wife to trade separately, the wife's business debts may be collected from her by proceedings in equity for declaring such debts a specific lien on her separate estate.² But in other States, such proceedings on behalf of creditors are not favored, each creditor having, under local statute, the usual remedies at law as though the woman were single.³ The other members of the firm ought to be made parties where the wife is a copartner.⁴ So, too, statutes permit the wife to sue, as if unmarried, the business debtors.⁵ Allegation of business, or, in other words, of separate capacity, should usually appear of record in all such suits, whether the married woman be plaintiff or defendant.⁶

The husband who does not participate in his wife's business is not usually held liable under our separate trading acts; and hence cannot be sued with his wife for her store rent.⁷

§ 319. **Trading; Effect of Marriage upon a Single Woman; A Wife's Bankruptcy.**—Apart from statutes giving a contrary scope to the rule, a single woman engaged in trade or business is legally engaged therein; if she marries, the disability of coverture puts an end to the trade, and dissolves her business copartnership if there be one; and thereupon the husband, by virtue of the common law, becomes liable for the business, even the partnership debts, having a corresponding right to recover her share in the assets on a winding up.⁸

A married woman's firm, trading under a permissive local statute, has been adjudged bankrupt in this country.⁹ But

¹ *Bitter v. Rathman*, 61 N. Y. 512.

² *Wheaton v. Phillips*, 1 Beasl. (N. J.) 221. And see *supra*, § 289.

³ *Meyers v. Rahte*, 46 Wis. 655; *Nash v. Mitchell*, 71 N. Y. 199; *Vosburgh v. Brown*, 66 Barb. 421; *Heller v. Rosselle*, 13 N. Y. Supr. 631; *Haight v. McVeagh*, 69 Ill. 624.

⁴ *Westphal v. Henney*, 49 Iowa, 542.

⁵ *Rockwell v. Clark*, 44 Conn. 534;

Smith v. New England Bank, 45 Conn. 416.

⁶ *Nash v. Mitchell*, 71 N. Y. 199; *Smith v. New England Bank*, 45 Conn. 416; *Magruder v. Buck*, 56 Miss. 314. And see next chapter.

⁷ *Jaycox v. Wing*, 66 Ill. 182.

⁸ *Alexander v. Morgan*, 31 Ohio St. 546; § 322, *post*.

⁹ *Re Kinkad*, 3 Biss. 405.

it is held in England that a married woman having no separate property cannot be adjudged a bankrupt upon a judgment against her for an indebtedness which does not concern a separate trade.¹

§ 320. *Separate Trading under Civil Code of France, Spain, Louisiana, &c.* — By the Civil Code of France, the wife may carry on a trade independently of her husband.² So the wife may be a separate trader under the custom of Paris.³ And a similar right is recognized by the laws of Spain and other European countries.⁴

From the civil, rather than the common law, are derived those property rights of married women which are recognized in Louisiana, California, and others of the South-western States, originally colonized by the Spanish and French. Thus the Louisiana code recognizes the capacity of the wife to carry on separate trade, or, as it is said, to constitute herself a public merchant, provided she act *bona fide*, and have an active agency in the concern.⁵

CHAPTER VII.

MODERN EQUITY AND LEGISLATIVE CHANGES; MISCELLANEOUS.

§ 321. *Miscellaneous Changes in Coverture Doctrine; General Summary.* — How great the change which modern equity and legislation have wrought, and modern legislation especially, in marital rights and duties as defined by the common law, will further appear from the miscellaneous changes to be noticed in this final chapter. These changes, which concern contracts, torts, property of the wife, and suits by or against her, may be specified as chiefly relating: (1) to the wife's

¹ *Ex parte Holland*, L. R. 9 Ch. 307.

² Code Civil, art. 220; 1 Burge Col. & For. Laws, 219.

³ 1 Burge Col. & For. Laws, 218.

⁴ *Ib.* 226, 420, 698.

⁵ La. Code, art. 128; *Christensen v. Stumpf*, 16 La. Ann. 50. And see *Camden v. Mullen*, 29 Cal. 564; *Reading v. Mullen*, 81 Cal. 104; *Community Doctrine*, Part VI. *post*.

antenuptial debts; (2) to the wife's general disability to contract; (3) to the necessities of wife and family; (4) to torts committed by the wife; (5) to torts committed upon the wife; (6) to torts or crimes committed by one spouse and affecting the other; (7) to the wife's property; (8) to actions by a married woman, her arbitration, &c.

§ 322. *The Wife's Antenuptial Debts.*—And, *first*, as concerning the wife's antenuptial debts.¹ The husband's legal responsibility for the debts incurred by his wife before marriage being founded in the theory that he had adopted her with her fortunes or misfortunes together, the creation of separate property rights on her behalf places this responsibility in a far more unfavorable light. The English Married Women's Act of 1870 abolishes the husband's liability for his wife's antenuptial debts, and fastens it upon such property, instead, as the wife may hold to her separate use;² though this is somewhat modified by a later act which regards certain assets he may have derived from her.³

So, too, in many of our States, it is now found that the husband's liability for his wife's antenuptial debts is either modified to the extent of the property received through her, or else abolished altogether; her separate estate, if she have any, being made subject, instead, to their payment.⁴

¹ For coverture doctrine, see *supra*, §§ 90-96.

² Act 33 & 34 Vict. c. 93; *Ex parte Holland*, L. R. 9 Ch. 307; *Sanger v. Sanger*, L. R. 11 Eq. 470.

³ Act 37 & 38 Vict. c. 50 (1874); *De Greuchy v. Wills*, L. R. 4 C. P. D. 362. Under this act the creditor may sue the husband, who has the option to plead non-liability, except as the act specifies. *Matthews v. Whittle*, L. R. 13 Ch. D. 811.

⁴ *Roundtree v. Thomas*, 32 Tex. 286; *Shore v. Taylor*, 46 Ind. 345; *Travis v. Willis*, 55 Miss. 557; *Wood v. Orford*, 52 Cal. 412; *Cannon v. Grantham*, 45 Miss. 88; *Madden v. Gilmer*, 40 Ala. 637; *Bryan v. Doolittle*, 38 Ga. 255; *Smiley v. Smiley*, 18 Ohio St. 543; *Bailey v. Pearson*, 9 Fost. 77; *Reunecker v. Scott*, 4 Greene (Iowa),

185; *Curry v. Shrader*, 19 Ala. 831; *Callahan v. Patterson*, 4 Tex. 61. Such abolishing acts are not retrospectively construed. *Clawson v. Hutchinson*, 11 S. C. 323. But as to Illinois, see *Connor v. Berry*, 46 Ill. 370, where the old liability is still recognized. So, too, in Ohio. *Alexander v. Morgan*, 31 Ohio St. 546. And the husband is there held liable for debts of a partnership in which the wife had been engaged before marriage. *Alexander v. Morgan*, 31 Ohio St. 546. See *Mobray v. Leckie*, 42 Md. 474.

Where a debt was contracted before marriage, it is held that the remedy against the wife's separate estate becomes suspended during marriage. *Vanderheyden v. Mallory*, 1 Comst. 452. But see *Dickson v. Miller*, 11 S. & M. 594.

§ 323. *The Wife's General Disability to Contract.—Second*, as to the wife's general disability to contract. Apart from all liability for necessities, under certain circumstances, some States now incline to permit the wife to contract¹ to much the same extent as a single woman; and so as to incur a separate liability;² though, as our preceding chapters have shown, legislative changes in England and America, as well as modern equity decisions, apply more universally to contracts beneficial to herself, or to such as were made with reference to her separate trade, or involving liabilities expressly charged by her upon her separate property.³ In general, still, the wife's contracts bind her property only and not her person.

§ 324. *Necessaries of Wife and Family.—Third*, as to the necessities of wife and family. A contract capacity, involving legal liability from the separate estate, is now quite frequently sustained as to the wife, without requiring her to stand on her old footing of agent for the husband to serve her dire needs.⁴ This, as an enlargement of contract power in a married woman, results in part from protecting her separate property, over which it is hardly just that she should enjoy full dominion, without contributing something from its income to the comforts of the matrimonial abode. In many States the husband is still under the common-law obligation to support his wife and family; and primarily this continues almost universally his duty; but great modifications of the old rule have of late been established both in England and America.

¹ As to coverture doctrine, see *supra*, §§ 97-99.

² The husband may thus become in legal contemplation the wife's agent in such transactions. See *Wilder v. Richie*, 117 Mass. 382; *Miller v. Brown*, 47 Mo. 506; *Hinkson v. Williams*, 41 N. J. L. 35; *Taylor v. Shelton*, 30 Conn. 122; *Gilbert v. Plant*, 18 Ind. 806; *Herrington v. Robertson*, 71 N. Y. 280; *Adams v. Charter*, 46 Conn. 551.

³ See *supra*, ca. 4, §, *passim*. Liability for the wife's debts is confined chiefly to cases where the wife intended

to deal with her separate estate and the contract was reasonably adapted to better such estate. *Kantrowitz v. Prather*, 31 Ind. 92. *Hasheagan v. Specker*, 36 Ind. 418; *McCormick v. Holbrook*, 22 Iowa, 487; *Stilwell v. Adams*, 29 Ark. 346. And so with protection of the property against the husband's creditors. *Seeds v. Kahler*, 76 Penn. St. 262.

⁴ For the coverture doctrine of necessities and the wife's agency for procuring them, see *supra*, §§ 100-126.

Thus, under the English Married Women's Act of 1870, a wife having separate property is rendered liable to the parish for the maintenance of her husband and children.¹ Some of the American married women's acts, too, charge the wife's separate estate distinctly with necessities or with articles of "family supply," though not unless she contracted for the articles, or unless, at least, her husband was destitute of the means of payment.²

Doubtless a married woman may become bound for her own necessities, and in a sense for what may be called "family necessities" to a reasonable and proper extent, contracted on the faith of her separate estate, whether her husband be insolvent or not, or without means, so long as neither he nor

¹ Act 33 & 34 Vict. c. 93.

² *Covert v. Hughes*, 15 N. Y. Supr. 805; *McCormick v. Muth*, 49 Iowa, 536; *Cunningham v. Fontaine*, 25 Ala. 644; *Rogers v. Boyd*, 38 Ala. 175; *Finn v. Rose*, 12 Iowa, 565. See *Sharp v. Burns*, 35 Ala. 653; *Callahan v. Patterson*, 4 Tex. 61. Debt incurred in procuring a substitute for a husband who was drafted is not included among "necessaries" thus chargeable upon the wife. *Ford v. Teal*, 7 Bush, 156. See, further, *Lawrence v. Sinnamon*, 24 Iowa, 80. State aid to a soldier's wife is chargeable as above. *Hammond v. Corbett*, 51 N. H. 311. Medical attendance, rendered the wife at her request, may be thus charged. *Yates v. Lurvey*, 65 Me. 221; *May v. Smith*, 48 Ala. 483. But see *Thomas v. Passage*, 54 Ind. 106; *Webber v. Spannhake*, 2 Redf. 258. Needful servants are thus charged. *Pippin v. Jones*, 52 Ala. 161.

But in New York, to charge the wife's separate estate for nurses and household expenses not rendered for its benefit, a distinct agreement to that effect must appear on the wife's part. *Eisenlord v. Snyder*, 71 N. Y. 45.

A husband, under some local statutes, is not liable for municipal expenses incurred in treating his insane wife at a public institution. *Delaware County v. McDonald*, 46 Iowa, 170;

Commissioners v. Schmoke, 51 Ind. 416. As to making a husband a pauper, by his wife's receiving pauper aid, under laws of settlement, see *Lewiston v. Harrison*, 69 Me. 504.

As statutory necessities cannot be charged against the wife's separate property, improvements on real estate, out-houses, and fencing. *Lee v. Campbell*, 61 Ala. 12; cf. *supra*, § 272. Money of the wife used by her husband, with her consent and knowledge, in payment of ordinary household expenses, and without agreement for its repayment, cannot be recovered by her from his estate. *Courtright v. Courtright*, 53 Iowa, 57. But see *Sherman v. King*, 51 Iowa, 182. As to the wife's check or draft for supplies, see *Castleman v. Jeffries*, 60 Ala. 380.

Under the Mississippi Code the wife's separate estate is liable for "plantation supplies." *Lake v. Dillard*, 55 Miss. 68; *Wright v. Walton*, 56 Miss. 1; *Ogden v. Guice*, 56 Miss. 330; *Grubbs v. Collins*, 54 Miss. 368. "Articles of comfort and support for the household" are thus chargeable in Alabama. *Baker v. Flournoy*, 58 Ala. 650; *Jones v. Wilson*, 57 Ala. 122; *May v. Smith*, 48 Ala. 483; *Cauly v. Blue*, 62 Ala. 77. "Expenses of the family" are thus chargeable under Iowa Code. *McCormick v. Muth*, 49 Iowa, 536; *Jones v. Glass*, 48 Iowa, 345.

his credit were considered in the transaction between herself and the storekeeper; and her separate estate is answerable accordingly in a suit against her under many statutes;¹ and this, in part at least, upon equity principle, too, as something beneficial to her, and authorized by her upon the express credit of her separate estate.² And though the husband be considered still presumably liable, as to supplies for the needful clothing, support, and education of his wife and family, the wife continuing his agent as at the common law, yet for such supplies the wife may, as some States hold, render herself liable, and by her actual consent, express or implied, constitute even the husband himself a purchaser of such supplies as her agent, she being the principal.³ If there be any good sense in the rule that, where credit is once given to the wife,

¹ *Gunn v. Samuel*, 33 Ala. 201; *Catron v. Warren*, 1 Cold. 358; *Wylly v. Collins*, 9 Ga. 223; *Black v. Bryan*, 18 Tex. 453; *Rigoney v. Neiman*, 73 Penn. St. 330; *O'Connor v. Chamberlain*, 59 Ala. 431; *Labaree v. Colby*, 69 Mass. 559; *Davidson v. McCandlish*, 69 Penn. St. 169; *Campbell v. White*, 22 Mich. 178; *Craft v. Rolland*, 37 Conn. 491.

² See *supra*, §§ 245, 259, for the limitations of this doctrine in equity. The wife's equitable separate estate is not, apart from her credit, liable for family board, though the husband be insolvent. *Mayer v. Galluchat*, 6 Rich. Eq. 1. But when upon credit of her separate estate, equity will enforce it. *Priest v. Cone*, 51 Vt. 495; *Roberts v. Kelley*, 51 Vt. 97. But cf. *Weir v. Groat*, 4 Hun, 193; *Sorrel v. Clayton*, 42 Tex. 188; *Baker v. Harder*, 4 Hun, 272; *Collins v. Underwood*, 33 Ark. 265. For in some States the wife's own benefit, apart from children or husband, is strictly regarded. House rent to a reasonable amount may be thus charged by wife's express procurement. *Harris v. Williams*, 44 Tex. 124; *Wright v. Meriwether*, 51 Ala. 183. But not without such express procurement. *Eustaphie v. Ketchum*, 13 N. Y. Supr. 621. Whether a husband's discharge in bankruptcy will re-

lieve the wife's estate from a claim for family necessities where it is not clear that express credit was given to the wife, see *Wilson v. Renshaw*, 91 Penn. St. 224; *Jones v. Glass*, 48 Iowa, 345.

Articles not strictly necessities have thus been charged upon the wife, she having expressly contracted. *Adams v. Charter*, 46 Conn. 551; *Miller v. Brown*, 47 Mo. 505. But not usually what were neither her necessities nor expressly contracted for. *Supra*, § 323; *Parker v. Dillard*, 50 Ala. 14. Where articles consist partly of enforceable necessities, and partly of articles not so enforceable, the liability of the former may be enforced, regardless of the latter articles. *Parker v. Dillard*, 50 Ala. 14; *Lee v. Tannenbaum*, 62 Ala. 501; *Roberts v. Kelley*, 51 Vt. 97. No change in the wife's statutory separate estate, existing and liable for the account when it was made, can defeat proceedings to compel payment. *Cheatham v. Newman*, 59 Ala. 547.

³ *Cook v. Ligon*, 54 Miss. 368. And see *Powers v. Russell*, 26 Mich. 179; *Wilson v. Herbert*, 41 N. J. L. 454; *Sherman v. King*, 51 Iowa, 182; *Miller v. Brown*, 47 Mo. 505, as to requiring affirmative proof that the wife purchased on her own credit in order to charge her separate estate.

the husband will not be liable, though the articles purchased be a necessary, it is in cases where the wife has a separate income or separate property of her own, and under her own control.¹

§ 325. *Torts committed by the Wife; American Statutes.*—*Fourth*, As to torts committed by the wife. While the coverture doctrine joins the husband as defendant in such suits, and makes him civilly answerable for his spouse, on the ground that he has taken her fortune, assuming all possible liabilities therefrom,² modern policy, in giving the wife her separate property, inclines to hold her responsible, like a single woman, for her civil injuries to others. Hence, numerous local statutes in the United States have recently taken away the husband's legal liability for his wife's private wrongs, committed upon others without his participation and privity, and have fastened it upon her separate estate instead;³ or else they have limited his liability for her frauds and injuries to that of a surety.⁴

Hence, as such statutes usually run, the joinder of the husband as defendant is neither necessary nor proper, where one sues for a tort or fraud of the wife committed with reference to her separate estate, and by the wife alone; while the wife, on her part, is liable substantially in the same manner and to the same extent for frauds or torts committed in its management as upon her contracts relating to it.⁵ And for injuries disconnected with such property she, and not her husband, is held liable. Thus, she is to be sued alone for wilfully setting fire to her own insured house to another's injury;⁶ for careless driving;⁷ for trespass;⁸ for obstructing a neighbor's en-

¹ Equity, under very strong circumstances of expediency, has required the wife's separate income to be applied towards her support; as where she is insane, and consequently both helpless as a wife and incapable of giving or withholding assent. See *Davenport v. Davenport*, 5 Allen, 404.

² See *supra*, §§ 133-139.

³ *Burt v. McBain*, 29 Mich. 200; cases *infra*.

⁴ *Brown v. Kemper*, 27 Md. 666.

⁵ *Baum v. Mullen*, 47 N. Y. 577;

Rowe v. Smith, 55 Barb. 417; *Lansing v. Holdridge*, 58 How. (N. Y.) Pr. 449; *Ferguson v. Brooks*, 67 Me. 251.

⁶ *Lansing v. Holdridge*, 58 How. (N. Y.) Pr. 449.

⁷ *Bicci v. Mueller*, 41 Mich. 214.

⁸ *Ferguson v. Brooks*, 67 Me. 251; *Carpenter v. Vail*, 36 Mich. 226; *Dailey v. Houston*, 58 Mo. 361. The rule of the wife's liability for trespass of her stray animals is strictly enforced in New York. *Rowe v. Smith*, 45 N. Y. 230.

joyment of his own premises;¹ for carelessly injuring property bailed to her;² and the like. Provided, in all fit cases, that, by demand or otherwise, the wife be put in the position of wrong-doer, as under the ordinary law of torts.³

For her frauds, too, the wife is usually held responsible in many States. As where she represents herself as a single woman, and obtains false credit.⁴ But where property is conveyed to the wife in fraud of her husband's creditors, she is not liable usually to a judgment *in personam*, nor are her executors; but the only remedy available to the injured parties is to pursue the property.⁵

§ 326. *Torts committed by the Wife; Husband's Concurrence, &c.* — We here assume that the husband has not connived at or abetted the wife's tort. If he be a party to the fraud or injury, he is answerable on his own part like any one *sui juris*. As to the married woman herself, courts still disincline to hold her liable upon any theory of principal employing agents, or where the wrongful act was committed without her personal knowledge and sanction.⁶ And where the husband appears to have compromised his wife in some transaction, especially one relative to business or property, whose wrongfulness he was likely to have understood more readily than herself, or where he coerced or misinformed her, an agency on his part, which shall charge her with the mischief, should not readily be assumed. Hence, as it is said, perhaps broadly, a wife shall not be held liable for the tort of her husband, by reason of a prior assent, advice, or authorization by her, or a passive acquiescence, if she does not participate as an actor, and has not profited or obtained benefit for her separate estate thereby.⁷ For a joint trespass or wrong by husband and wife, it may be presumed still that the latter was under the former's coercion,⁸ though, such presumption being far from

¹ *Austin v. Cox*, 118 Mass. 58.

² *Hagebush v. Ragland*, 78 Ill. 40; *Gilbert v. Plant*, 18 Ind. 806.

³ *Campbell v. Quackenbush*, 83 Mich. 287; *Jansen v. Varnum*, 89 Ill. 100.

⁴ *Goulding v. Davidson*, 26 N. Y. 604. But as the contract capacity of a married woman is not fully admitted by legislators, frauds relating to her

general contracts are not always thus punishable. See *Felton v. Reid*, 7 Jones, 269.

⁵ *Phipps v. Sedgwick*, 95 U. S. Supr. 3.

⁶ See *Jansen v. Varnum*, 89 Ill. 100.

⁷ *Vanneman v. Powers*, 56 N. Y. 89.

⁸ *Supra*, §§ 135, 138. See *Dailey v. Houston*, 58 Mo. 361.

conclusive, a wife is now held responsible, under statute, for wrongs she commits deliberately in her husband's company, and, like other parties not under disability, for what she plainly and understandingly authorizes and ratifies to another's injury.¹

§ 327. **Torts committed by the Wife; Equity Rule.** — In England, where the coverture doctrine appears still to prevail in this respect, settlements to the wife's separate use, under a restraint of anticipation, cannot be evaded or set aside; that clause strictly operating even in case of the wife's gross fraud to another's injury.² And the rule strictly obtains in courts of chancery, that the separate estate of a married woman is not liable for her torts or breach of trust.³

§ 328. **Torts committed upon the Wife.** — *Fifth*, as to torts committed upon the wife. At common law the husband was entitled to the recompense for all such injuries to the wife's person, property, or character, by suit brought in his own name, or in the name of both, as the case might be.⁴ But the tendency of modern legislation is to secure to the wife's separate use all compensation in the nature of damages for injuries sustained by her through the negligence or misconduct of others;⁵ and the wife sues in her individual name in many States to obtain such compensation.⁶

Thus has the wife, as sole or substantial party, been allowed to sue for direct injury to herself from another's malpractice,⁷ or slander,⁸ or trespass;⁹ and, indeed, not only

¹ *Ferguson v. Brooks*, 67 Me. 251; *Sherman v. Hogland*, 73 Ind. 472.

² *Stanley v. Stanley*, 7 Ch. D. 589.

³ *Id.*; *Wainford v. Heyl*, L. R. 20 Eq. 321; *Marler v. Thomas*, L. R. 17 Eq. 8.

⁴ See *supra*, §§ 140-144.

⁵ *Waldo v. Goodsell*, 38 Conn. 432; *Moody v. Osgood*, 50 Barb. 628; *Knapp v. Smith*, 27 N. Y. 277.

Where her husband is insane and out of the State, the wife may sue, on her personal wrong, in her own name. *Gustin v. Carpenter*, 51 Vt. 585.

Where the wife is required to sue alone by statute, the husband's joinder is ground for reversal. *Chicago v. Speer*, 66 Ill. 154. As to "notice of injury," see *Babcock v. Guilford*, 47 Vt. 519; *Church v. Westminster*, 45 Vt. 380.

⁶ *Stoneman v. Erie R. Co.*, 53 N. Y. 429; *Berger v. Jacobs*, 21 Mich. 215; *Ball v. Bullard*, 52 Barb. 141; *Chicago, &c. R. R. Co. v. Dunn*, 52 Ill. 260. But the husband is sometimes a necessary party still. *Shaddock v. Clifton*, 22 Wis. 114; *Pancoast v. Burnell*, 32 Iowa, 394; *Church v. Westminster*, 45 Vt. 380; *Farmer v. Lanman*, 73 Ind. 568; *Packet Co. v. Clough*, 20 Wall. 528; *Anderson v. Anderson*, 11 Bush. 327. Where the husband must join, the wife should not sue in his name without his assent. *Clark v. Koch*, 9 Phila. 109.

⁷ *Mewhirter v. Hatten*, 42 Iowa, 268.

⁸ *Martin v. Robson*, 65 Ill. 129.

⁹ See *Bradford v. Hanscom*, 68 Me. 103; *Spencer v. St. Paul R.*, 22 Minn. 29.

with reference to separate estate or business, but as to injuries to her person or character generally.¹ A married woman has, also, been permitted to sue a railroad company for personal injuries caused by the carrier's negligence,² and for her baggage, lost through like negligence.³ Under certain local statutes, too, a wife may now sue a liquor-dealer for damages caused her by selling liquors to her husband,⁴ or a gamester for money lost by her husband at gaming.⁵

Under such a policy, contrary to the common law, it is held that an action in the name of husband and wife for injuries to the latter will survive to her administrator.⁶ Neither fraud nor negligence on the husband's part can bar the wife's right of action, she being the injured party.⁷ He cannot interfere with her right to claim damages, nor extinguish or release it, nor lessen the amount by his sole compromise.⁸ In the husband's separate suit for consequential injuries,⁹ as to loss of his wife's services, there is some uncertainty;¹⁰ but as he is usually bound still to afford medical attendance, his claim is favorably regarded in that respect at least.¹¹ An action by the wife for her sole damages, even though the husband be made a nominal co-plaintiff under the statute, will not, if withdrawn in her behalf, bar his separate action for his own expenses and damages from the same injury, but this he may bring and conduct at his own discretion.¹²

§ 329. *Torts and Crimes committed by one Spouse affecting the Other, &c.* — *Sixth.* Here we may add that husband and

¹ *Townsdin v. Nutt*, 19 Kan. 282; *Omaha Horse R. v. Doolittle*, 7 Neb. 481.

² *Tuttle v. Chicago R.*, 42 Iowa, 518; *Chicago R. v. Dickson*, 67 Ill. 122. And see *supra*, §§ 142, 144.

³ *Pierson v. Smith*, 9 Ohio St. 98.

⁴ *Schneider v. Hosier*, 21 Ohio St. 98.

⁵ *Read v. Stewart*, 129 Mass. 407.

⁶ *Earl v. Tupper*, 45 Vt. 275; *supra*, § 142. As to survivorship of husband's right of action for consequential injuries, see *Cregin v. Brooklyn R.*, 83 N. Y. 595.

⁷ *Moore v. Foote*, 34 Mich. 448; *Flori v. St. Louis*, 3 Mo. App. 231.

⁸ *Martin v. Robson*, 65 Ill. 129; *Chicago R. v. Dickson*, 67 Ill. 122.

⁹ See *supra*, § 143.

¹⁰ The husband cannot here recover for money expended that belonged to his wife. *Walden v. Clark*, 60 Vt. 883. The test seems to be, as to services and earnings, whether the husband is still entitled to his wife's services, and not as to her separate earnings. *Klein v. Jewett*, 26 N. J. Eq. 474; *Brooks v. Schwerin*, 54 N. Y. 343. See *supra*, c. 6.

¹¹ *Tuttle v. Chicago R.*, 42 Iowa, 518. Unless estopped by allowing his wife to recover such expenses. *Neumeister v. Dubuque*, 47 Iowa, 465.

¹² *Stepanck v. Kula*, 86 Iowa, 563; *Smith v. St. Joseph*, 55 Mo. 456; *Me-whirter v. Hatten*, 42 Iowa, 288.

wife cannot, without express legislation to that effect, be indicted for the larceny or burglary or arson of one another's property, nor sued in tort for damages respecting such mutual property, more than at common law; equity and the married woman's acts importing no change in this respect, by the mere creation of a separate estate in the wife's favor.¹ The tendency, however, is to exempt each from the consequences of the other's torts, holding husband or wife liable only for the wrong to others in which he or she participates, nor permitting the incidental and unsanctioned fraud, injury, or negligence of the one to obstruct the legal remedies of the other and innocent one.²

§ 330. *Changes concerning the Wife's Property.—Seventh.* As to changes affecting the wife's property, the preceding chapters upon separate estate and separate trading may in general suffice. While the wife's equity to a settlement is still recognized, by way, at least, of election on her part to claim the benefit of a married women's act,³ and perhaps on the further behalf of children by the marriage, it cannot be asserted for the wife's undue advantage; as for instance, to compel, against a mortgagee, that provision be made out of the property which she has lawfully mortgaged for a specified security.⁴

In some States the husband's life interest in his wife's real estate⁵ is protected from attachment during marriage; and this interest is generally, though not uniformly, preserved under the married women's acts, as well as his tenancy by the curtesy;⁶ the husband being allowed, however, to dispose of it to the exclusion of his creditors.⁷

¹ *Thomas v. Thomas*, 51 Ill. 162; *Snyder v. People*, 26 Mich. 106; *Morgan v. State*, 63 Ga. 307. See *supra*, §§ 77-79, 88; *Overton v. State*, 43 Tex. 646.

² *Moore v. Foote*, 34 Mich. 448; *Flori v. St. Louis*, 8 Mo. App. 281; *Campbell v. Quackenbush*, 38 Mich. 287; *Martin v. Robson*, 65 Ill. 129.

³ *Blevins v. Buck*, 26 Ala. 292.

⁴ *Allen v. Lenoir*, 53 Miss. 321. See *supra*, §§ 160-162, as to the wife's equity to a settlement.

⁵ For coverture doctrine, see *supra*, §§ 164, 167.

⁶ *Bachman v. Chrisman*, 23 Penn. St. 162; *Van Note v. Downey*, 4 Dutch. 219; *Rose v. Sanderson*, 38 Ill. 247. In some States curtesy consummate is protected, while the husband's usufruct during his wife's life is taken away. *Porch v. Fries*, 3 C. E. Green, 204. And see *Lynde v. McGregor*, 13 Allen, 182; *Montgomery v. Tate*, 12 Ind. 615. See also in general, as to tenancy by the curtesy, *post*, Part VIII.

⁷ *Teagus v. Downs*, 69 N. C. 260.

§ 331. *Wife's Right to sue, submit to Arbitration, &c.* — *Eighth.* Concerning actions, &c., by or on behalf of a married woman, including arbitration. Modern local statutes have in these respects wrought great changes. Doubtless, in various States, the joinder of husband and wife as plaintiffs is still proper, even where the wife is the meritorious cause of action.¹ The English act of 1870 permits the married woman to maintain an action in her own name in respect of her separate property.² And in Maine, New Hampshire, Massachusetts, New York, Illinois, Indiana, Kansas, and some other States, a wife may now sue at law, in matters relating to her separate property, without joining her husband.³ So she may, in some States, bind herself by a submission to arbitration.⁴ But she cannot usually confess judgment, though it be for a debt incurred for the benefit of her separate estate, as this is not beneficial to her, and its exercise is liable to abuse.⁵ She may make a compromise and settlement as to claims, by right of her separate estate.⁶

In States tending to the *feme sole* doctrine in legislation, the wife may accordingly, without joining her husband, not only sue in actions of contract, but bring ejectment,⁷ or replevin,⁸ or sue in trespass,⁹ or for rent under her lease,¹⁰ or on

¹ See *supra*, §§ 86-89; Reinheimer v. Carter, 31 Ohio St. 579; Baird v. Fletcher, 50 Vt. 603. As to actions affecting the wife's real estate, where the adult husband is under guardianship for insanity, &c., see Hamilton v. Colwell, 10 R. I. 39.

² Act 33 and 34 Vict. c. 93 (1870).

³ Walker v. Gilman, 45 Me. 28; Ackly v. Tarbox, 31 N. Y. 585; Furrow v. Chapin, 13 Kan. 107; Alexanders v. Goodwin, 54 N. H. 423; Forbes v. Tuckerman, 115 Mass. 115; Peters v. Fowler, 41 Barb. 467; Emerson v. Clayton, 32 Ill. 493; Leonard v. Townsend, 26 Cal. 435; Weymouth v. Chicago, &c. R. R. Co., 17 Wis. 550; Jordan v. Cummings, 43 N. H. 134; Gee v. Lewis, 20 Ind. 149; Beavers v. Baucum, 33 Ark. 722.

⁴ Palmer v. Davis, 28 N. Y. 242; Duren v. Getchell, 55 Me. 241. As to

Mississippi, cf. Handy v. Cobb, 44 Miss. 699; Memphis R. v. Scruggs, 50 Miss. 284.

⁵ Watkins v. Abrahams, 24 N. J. 72. And see Patton v. Stewart, 19 Ind. 233. Otherwise in some States, for the right itself is theoretically incidental to the liability of being sued as if sole. Bank v. Garlinghouse, 53 Barb. 615; Travis v. Willis, 55 Miss. 557. See Thomas v. Lowy, 60 Ill. 512.

⁶ Husband v. Epling, 81 Ill. 172; Lewis v. Gunn, 63 Ga. 542.

⁷ Wood v. Wood, 18 Hun, 350; Betz v. Mullin, 62 Ala. 365. But cf., as to action by husband and wife, Westcott v. Miller, 42 Wis. 454.

⁸ Montgomery v. Hickman, 62 Ind. 598; Dickson v. Randal, 19 Kan. 212.

⁹ Strasburger v. Barber, 38 Mo.

103.

¹⁰ Hayner v. Smith, 63 Ill. 430.

an agreement to convey real estate to her, which did not name her husband as a party.¹ Where the wife should not sue alone in law, it might appear that, in respect of separate property, the husband should sue alone as trustee for her; so that in either case their joint suit would be bad.²

In States having no sufficient enabling act, and considerate for the old policy of preserving domestic harmony, the married woman cannot, even by next friend, sue the husband at law upon a contract made during coverture.³ But in some States the legislature permits the wife to sue her husband, as well as others, in respect of her separate property.⁴ Her judgment against the husband to recover her premises which are occupied as the matrimonial abode, must needs be attended with practical difficulties;⁵ and so must her entry to foreclose, where she is mortgagee of the land, while her husband holds the equity of redemption.⁶

§ 382. *Wife's Resort to Chancery in Respect of Property, &c.* — But while, as concerns suits by a wife at law in respect

¹ *Stampoffski v. Hooper*, 75 Ill. 241. For suit for injury to reversion of her land, as distinguished from injury to the joint marital possessions or crops, see *Lyon v. Green Bay R.*, 42 Wis. 548; *Indianapolis R. v. McLaughlin*, 77 Ill. 275. Where the suit relates to unpaid taxes upon the wife's land, the wife may sue, and show by parol that they are her separate lands, notwithstanding they were taxed to her husband. *Dinsmore v. Winegar*, 57 N. H. 382. Cf. *Williams v. Turner*, 60 Tex. 137. The husband cannot maintain trespass *qu. cl. fr.* against one who carries away soil from his wife's farm. *Bradford v. Hanscom*, 68 Me. 103.

The statute of limitations runs, as usual, so far as the coverture disability has been removed under the local act. *Hayward v. Gunn*, 82 Ill. 385.

² *Bell v. Allen*, 53 Ala. 125. And see *Wilson v. Garaghty*, 70 Mo. 517.

³ *Ritter v. Ritter*, 81 Penn. St. 396. Neither assumpsit nor replevin can thus be maintained. *Hobbs v. Hobbs*, 70 Me. 381, 383.

⁴ *Davis v. First Nat. Bank*, 5 Neb. 242; *Hardin v. Gerard*, 10 Bush, 259;

Scott v. Scott, 13 Ind. 225; *Chestnut v. Chestnut*, 77 Ill. 346.

⁵ *Manning v. Manning*, 70 N. C. 293. Whether trover lies for fixtures placed by the husband on his wife's land, see *Morrison v. Berry*, 42 Mich. 389.

⁶ *Tucker v. Fenno*, 110 Mass. 311. And so *vice versa*, where her husband desires to foreclose. *Cormerais v. Weselhoeft*, 114 Mass. 550.

The policy recognized in several cases, upon this mooted point of statute construction, is to regard the wife as having rights of action, though not permitting the remedy to be fully enforced while coverture lasts; but in others, right and remedy are more decidedly negatived; and in either instance the desire manifested is to uphold the sanctity and peace of conjugal life by discouraging litigious disputes between the united parties. Another objection to admitting such suits is the danger that husband and wife may thus connive to defraud creditors, as where, for instance, the one should default upon an improper claim, and permit his property to be nominally absorbed by the other.

to her separate estate, it may not be deemed necessary to join the husband with her as plaintiff, in equity proceedings it might be different, for here all interested parties are to be embraced in a bill. Thus, where the wife seeks to enforce a vendor's lien for money due on land conveyed by her and her husband, but belonging solely to her, it is proper that the husband should be made a party, so as to protect the title from any subsequent claim on his part.¹ But the Massachusetts act is construed as to "suing and being sued," so that the husband need not be made a party complainant, even to a bill in equity brought by the wife, where it concerns her separate property.²

Chancery proceedings may be instituted by the wife as it would appear, by her next friend or otherwise, in respect of her separate property, so as to render the husband a party defendant and bind him by the decree.³ In general, however, where local statute confers upon the wife the full legal title to her separate property, together with ample remedies, she cannot come into equity unless she can show some special ground of equitable cognizance, such as fraud upon her rights.⁴

§ 333. *Wife's Right to Sue, &c.; Various Incidents.* — An act providing that a wife may sue or be sued as if sole affects, it would appear, the remedy only, in such a sense as to apply whether the contract was made before or after the law was passed, provided the action be not commenced until after.⁵ As such acts are commonly construed, some allegation of separate contract capacity or liability on her part ought to be shown by the pleadings; ⁶ for, after all, such capacity or lia-

¹ *Wing v. Goodman*, 75 Ill. 159.

² *Forbes v. Tuckerman*, 115 Mass. 115. This appears to be the New Jersey rule. *Tantum v. Coleman*, 26 N. J. Eq. 128. But cf. *Robinson v. Trofitter*, 109 Mass. 578; *Cantrell v. Davidson*, 3 Tenn. Ch. 426, where the husband may be deemed an interested party defendant. So as to restraining the collection of an illegal tax, where both husband and wife occupy the land as their home. *Henry v. Gregory*, 29 Mich. 68. See further, *Koehler v. Bernicker*, 63 Mo. 368.

³ *Cantrell v. Davidson*, 3 Tenn. Ch. 426; *Robinson v. Trofitter*, 109 Mass. 578; *Bennett v. Winfield*, 4 Heisk. 440; *Reynaud v. Memphis Ins. Co.*, 7 Baxt. 279.

⁴ *Daniel v. Stewart*, 55 Ala. 278; *Furness v. McGovern*, 78 Ill. 337.

⁵ *Buckingham v. Moss*, 40 Conn. 461.

⁶ *Nash v. Mitchell*, 71 N. Y. 199; *Magruder v. Buck*, 56 Miss. 314; *Smith v. New England Bank*, 45 Conn. 416; *Starke v. Malone*, 51 Ala. 169.

bility, as conferred by the married women's acts, is taken to be somewhat exceptional, and courts and legislatures still disincline to permit a married woman to sue and be sued in respect of her contracts, irrespective of her separate property.¹

A married woman sometimes sues properly by a next friend.² Where she is insane, for instance, the law will not in general presume her consent to a bill in equity filed by her husband in their joint names, nor his agency in employing an attorney to represent her; her interests being distinct from his own.³ A statute guardian is sometimes appointed to protect the separate interests of an insane married woman, with relation to her property, or suits in which she is concerned.⁴

§ 334. **Conclusion as to Married Women's Acts.** — To attempt a minute analysis of the married women's acts would require more space than our plan will permit. Nor would it profit the reader. The independent legislation of some thirty distinct communities, without uniformity of plan or principle, involving, as it does, the most interesting and yet the most perplexing of social problems, must necessarily produce results which cannot be reconciled. It is too early yet to generalize from the decisions. Even though the hand of innovation should be stayed for a while, and public attention centre in the work of blending these results into harmony, it would be many years before our courts, applying civil codes and the traditions of the English common law and equity jurisprudence to the discordant mass of material before them, could hope to set up a consistent and thorough American system. As one of our own jurists well remarks,⁵ wherever the line may be drawn, it will be long before the public will understand and recognize the point where the power of a married woman to bind herself by her bargains ceases, and frauds upon the thoughtless and inconsiderate must often occur.

The ultimate scope of all this legislation must, however, be either, regarding the wife as peculiarly exposed to coercion and

¹ What qualifications apply in certain States to this rule, the reader will gather from this and the preceding chapters.

² *Leftwick v. Hamilton*, 9 Heisk. 310.

³ *Stephens v. Porter*, 11 Heisk. 341.

⁴ *Gardner v. Maroney*, 95 Ill. 552.

⁵ Per Bell, C. J., in *Ames v. Foster*, 42 N. H. 381.

subtle influence, if not mastery by main force, from the natural necessities of her position in the conjugal partnership, as one of the weaker sex, to afford that legal protection and shelter which she has always claimed, and which our law in a strait could never deny her ; or else, as though no such necessities exist in a state of nature, but her disabilities have been rather created by municipal law, and enforced by tyrannical men, to treat her as *sui juris*, and make her bear the full responsibility of her own legal engagements, be they prudent or foolish, like one discover. A careful review of the latest decisions cited in the last seven chapters shows that the married woman is still far from being bound, or desirous of being bound, to the latter alternative. She is seen setting up in the courts, not her own ignorance alone, for the avoidance of her contracts, and the retention of her separate property against strangers, but her own fraud, her own deliberate and wilful misstatements to others, her own connivance with her husband in dishonest schemes. We shall not inquire whether all this is the effect more of evil intention on her part, or evil advice ; but in the courts, certainly, the wife does not yet appear sounder in rectitude and regard for honorable dealings with the great world than her husband.

PART VI.

COMMUNITY DOCTRINE.

§ 335. **Community Doctrine applies to Marital Property; Traces found in States once under French and Spanish Dominion.** — The *communio bonorum*, or community system, relates to marital property, in which respect it occupies an intermediate position between the civil and common-law schemes. The *communio bonorum* may have been part of the Roman law at an earlier period of its history, but it had ceased to exist long before the compilation of the Digest; though parties might by their nuptial agreement adopt it.¹ This constitutes so prominent a feature of the codes of France, Spain, and other countries of modern Europe, whence it has likewise found its way to Louisiana, Florida, Texas, California, and other adjacent States, once subject to French and Spanish dominion, and erected, in fact, out of territory acquired during the present century upon the Mississippi, the Gulf of Mexico, and the Pacific Ocean, that it deserves a brief notice.

§ 336. **The Community System regards Marriage as a Species of Partnership; its Application, &c.** — The relation of husband and wife is regarded by these codes as a species of partnership, the property of which, like that of any other partnership, is primarily liable for the payment of debts. This partnership or community applies to all property acquired during marriage; and it is the well-settled rule that the debts of the partnership have priority of claim to satisfaction out of the community estate. Sometimes the community is universal, comprising not only property acquired during cover-

¹ 1 Burge Col. & For. Laws, 202; *ib.* 263 *et seq.*

ture, but all which belonged to the husband and wife before or at their marriage.¹

It is evident, therefore, that the provisions of such codes may differ widely in different States or countries. The principle which distinguishes the community from both the civil and common-law schemes is, however, clear; namely, that husband and wife should have no property apart from one another.

§ 337. *The European Doctrine of Community.* — Under modern European codes this law of community embraces profits, income, earnings, and all property which, from its nature and the interest of the owner, is the subject of his uncontrolled and absolute alienation; but certain gifts made between husband and wife in contemplation of marriage are of course properly excluded.² Whether antenuptial debts are to be paid from the common property, as well as debts contracted while the relation of husband and wife continues, would seem to depend upon the extent of the *communio bonorum*, as including property brought by each as capital stock to the marriage, or only such property as they acquire afterwards.³

The codes of modern Europe recognize no general capacity of the wife to contract, sue and be sued, as at the later civil law. On the contrary, the husband becomes, by his marriage, the curator of his wife. He has, therefore, the sole administration and management of her property, and that of the community; and she is entirely excluded in every case in which her acts cannot be referred to an authority, express or implied, from her husband.⁴ Hence, too, all debts and charges are incurred by the husband.

The community ceases on the termination of marriage by mutual separation or the death of either spouse.⁵ And the various codes provide for the rights of the survivor on the legal dissolution of the community by death.

¹ 1 Burge Col. & For. Laws, 277 both real and personal estate. *Childress v. Cutter*, 16 Mis. 24. *et seq.*

² 1 Burge Col. & For. Laws, 281, 282. By the French law only the personal estate entered into the community; but the Spanish law included

³ *Ib.* 294.

⁴ *Ib.* 296, 301.

⁵ *Ib.* 303, 305.

§ 338. **Influence of this Doctrine upon the Jurisprudence of Louisiana and other Annexed States of the South-west**—The reader may readily trace the influence of the community system upon the jurisprudence of Louisiana and the other States to which we have referred, whose annexation was subsequent to the adoption of our Federal Constitution, by examining their judicial reports. The Civil Code of Louisiana, as amended and promulgated in 1824, pronounced that the partnership or community of *acquêts* or gains arising during coverture should exist in every marriage where there was no stipulation to the contrary. This was a legal consequence of marriage under the Spanish law.¹ The statutes of Texas, Florida, Missouri, California, and other neighboring States, are characterized by similar features. But all of these laws have been modified by settlers bringing with them the principles of the common law. So, too, the doctrines of separate estate, revived in modern jurisprudence, are introduced into the legislation of these, as other American States;² as our preceding chapters have shown.

§ 339. **American Community Doctrine; Acquisitions during Marriage; Control by Husband**.—The American community doctrine, as we may term it, is that all property purchased or acquired during marriage, by or in the name of either husband or wife, or both, including the produce of reciprocal industry and labor, shall be deemed to belong *prima facie* to the community, and be held liable for the community marriage debts accordingly.³

The husband, being the head of the family, has the sole right to administer or control this property; and hence not only may he sell and dispose of any portion of it during mar-

¹ Art. 2812, 2369, 2370; 2 Kent Com. 183, n.

² Texas Digest, Paschal, "Marital Rights;" Cal. Civil Code, "Husband & Wife;" Parker's Cal. Dig. "Husband & Wife;" Walker v. Howard, 34 Tex. 478; Caulk v. Picou, 28 La. Ann. 277. And see Forbes v. Moore, 32 Tex. 195.

³ Louisiana Civil Code, §§ 2369-2372; Succession of Planchet, 29 La.

Ann. 520; Tally v. Heffner, 29 La. Ann. 583. Land owned by a spouse at the time of marriage does not fall into the community. Lake v. Lake, 52 Cal. 428; Eslinger v. Eslinger, 47 Cal. 62. The wife's earnings, unless given her by the husband, and likewise property bought with such earnings, must belong to the community. Johnson v. Burford, 39 Tex. 242. But see Fisk v. Flores, 43 Tex. 340.

riage, or sue alone concerning it, but it is rendered primarily liable for all debts contracted by him during marriage, as it is also for debts for necessities contracted by the wife during the same period; debts anterior to the marriage of either husband or wife, being acquitted out of the individual property of each respectively. He may, for family purposes, enjoy the income of the property likewise.¹

§ 340. **American Community; Effect of Death.**— Upon the dissolution of marriage by death, there having been no testamentary disposition to the contrary of the disposable share of deceased, this community property goes, after payment of all community debts, as generally regulated, to the survivor, if the deceased leaves no descendant; otherwise, one half to the survivor and one half to the descendants.² A surviving husband controls the community assets, by way of administration, however, until the debts of the marriage, which are in effect his debts, are settled, as prior to all claims for a distribution.³

¹ La. Code, § 2873; *Kellogg v. Duralde*, 26 La. Ann. 234; *Cooper v. Cappel*, 29 La. Ann. 213; *Ranney v. Miller*, 51 Tex. 263; *Strother v. Hamlet*, 28 La. Ann. 839. The husband may encumber all real estate of the community except the homestead. *Mabry v. Harrison*, 44 Tex. 286. As to debts of a former marriage community, see *Bollinger's Succession*, 30 La. Ann. 193. In Texas the community property must respond for a wife's antenuptial debts after her separate property has been exhausted. *Taylor v. Murphy*, 50 Tex. 291. When separate funds of the husband have been manifestly used to enrich and benefit the community, it constitutes a debt of the community in the husband's favor.

Denègre v. Denègre, 30 La. Ann. 275; *Martin v. Martin*, 52 Cal. 235. Debts of the marriage union are in general the debts of the husband; he is absolutely bound for their payment and his separate property may be sold for their acquittal. *Hawley v. Crescent City Bank*, 26 La. Ann. 230. But though the wife's mortgage on the community creates no lien, strictly speaking, it may become a lien on her separate interest when the community ceases. *Parry v. Kelley*, 52 Cal. 334.

² La. Code, §§ 2375, 2378; *Broad v. Murray*, 44 Cal. 228; *Johnson v. Harrison*, 48 Tex. 257. A surviving husband in Louisiana is absolute owner of half the community property and lifetime usufructuary of the other half against heirs of the deceased wife. *Succession of Planchet*, 29 La. Ann. 520. And as to the widow, see *Forstall v. Forstall*, 28 La. Ann. 107; *Hickman v. Thompson*, 24 La. Ann. 264. A widow accepting the community is liable for half the community debts, though not more. *Ludelling v. Felton*, 29 La. Ann. 719.

³ *Hawley v. Crescent City Bank*, 26 La. Ann. 230; *Williams v. Fuller*, 27 La. Ann. 634; *Cordier v. Cage*, 44 Tex. 352; *Cook v. Norman*, 50 Cal. 633. On dissolution of marriage by divorce, community property must satisfy community debts incurred before institution of the divorce suit. *Richey v. Hare*, 41 Tex. 336. And see *Mann v. Mann*, 24 La. Ann. 437.

As to the survivor's selling real es-

§ 341. **American Community only a Presumption; Estates of Spouses may be Separated; Acquisitions before Marriage.**— But it will be perceived that, in these codes, community, as an incident to marriage property, is only a presumption, which may be overcome in any instance by proof that the property was acquired as the separate estate of either the husband or wife. This community rule, moreover, as it is evident, does not apply to the property which either husband or wife brought into the marriage; such property, by the codes, being distinctly kept to each spouse apart, as his or her separate property.¹ And, besides, it is now usually provided by legislation that property acquired during marriage, “by gift, bequest, devise, or descent,” with the rents, issues, and profits thereof, shall be separate, not common property. The tendency, then, in our States, where the law of community still exists — though all have not proceeded in legislation to the same length — is to limit rather than extend its application.

Both the surviving wife and her heirs or assigns have the privilege of exonerating themselves from the debts contracted during the marriage, by renouncing the partnership or community; in which case the wife takes back all her effects, whether dotal, extra-dotal, hereditary or proper;² but subject, perhaps, to the intermediate rights of innocent purchasers.³

§ 342. **American Community; Wife's Tacit Mortgage; Her Judicial Protection.**— The wife has a tacit mortgage for her

tate, &c., for payment, there are numerous decisions. *Charpoux v. Bellocq*, 31 La. Ann. 164; *Wright v. McGinty*, 37 Tex. 783. It is a long-established principle that a sale of community property, fairly made by the surviving husband for discharging the community obligations, cannot be disturbed by the wife's heirs; and that (independently of later requirements), he is not required to exhaust the personalty before selling land for that purpose. *Wenar v. Stenzel*, 48 Tex. 484; *Hawley v. Crescent City Bank*, 26 La. Ann. 280.

¹ La. Code, §§ 2316, 2360, 2371; *Pinard's Succession*, 30 La. Ann. 167; *McAfee v. Robertson*, 48 Tex. 591; *Webb's Estate*, *Myrick's Prob.* 93; *Schmeltz v. Garey*, 49 Tex. 49. But the wife should not mingle her separate funds with those of the community in making a purchase, as of her separate estate. *Reid v. Rochereau*, 2 Woods, 151. See *Patton's Estate*, *Myrick's Prob.* 241.

² La. Code, §§ 2370-2392.

³ *Kirk v. Houston Nav. Co.*, 49 Tex. 213.

separate property, so far as the law may have placed it in her husband's control; also upon the community property from the time it went into his hands; so that, notwithstanding his conveyance or transfer without her consent and to her injury, during the marriage, she has an interest, and not a mere hope or expectancy, left, which interest becomes absolute and enforceable at his death, she surviving him. In this respect our codes follow the Spanish rather than the French law. And for the wife's further protection and benefit, judicial intervention is sometimes permitted, not only to secure her support from the funds in her husband's control, while marriage continues, but for a separation of the common property altogether, where her interests are exposed to great hazard by his mismanagement.¹ The tendency of the courts and legislatures is to make community property liable for community debts alone, and separate property of the wife for her separate debts alone.²

§ 343. **American Community; Mutual Agreement of Husband and Wife to exclude, &c.** — More than this, agreements for a separation of property between husband and wife are now greatly favored; antenuptial marriage contracts, and gifts for the wife's benefit, made after as well as before the marriage; so long, at least, as the latter do not tend to impair conjugal rights of the husband pertaining to wife and children, nor seek to alter the legal order of descent. A husband may now make a grant or gift of community or of his separate property to his wife, without the intervention of trustees; or they may stipulate that there shall be no community between them; and their matrimonial regulations are liberally upheld, if not contrary to good morals, it being always understood that they conform to such formalities as the code may have imposed upon them.³

¹ *Newman v. Eaton*, 27 La. Ann. 341. which were subsequently decreed in her favor, is presumed to be her separate property. *Drumm v. Kleinman*, 31 La. Ann. 124.

² *Vickers v. Block*, 31 La. Ann. 267; La. Code, §§ 2355, 2367, 2399-2412; *Lewis v. Winston*, 26 La. Ann. 707; *Newman v. Eaton*, 27 La. Ann. 341. Property bought by a wife in her own name after instituting a suit for a divorce and separation of property, *Murrison v. Seiler*, 22 La. Ann. 327; *Desobry v. Schlater*, 25 La. Ann. 425; *Smith v. Boquet*, 27 Tex. 507; Texas, Louisiana, and California Codes, Succession of *Wade*, 21 La. Ann.

§ 344. *The Wife's Separate Property under Community System.* — The tendency of these codes as to separate property is to assimilate to those of other States. A wife separated in property is liable for her proportion of the household expenses; and for the whole of such expenses if her husband be without means.¹ Of her separate property she retains the full right of dominion, and may resume it at any time; and debts contracted by her, inuring to its benefit, bind her.² But for community debts she cannot bind herself, and the husband alone can be sued thereon;³ and so as to debts incurred by her husband, even where she is separate in property, if not inuring to her separate benefit nor legitimate family expenses.⁴

Separate property of the wife, under these codes, is of two kinds: dotal and extra-dotal. Dotal property is that which the wife brings to the husband to assist him in bearing the expenses of the marriage establishment. Extra-dotal property, otherwise called paraphernal property, is that which forms no part of the dowry.⁵ Whatever in the marriage contract is declared to belong to the wife, or to be given to her on account of the marriage by other persons than the husband, is part of the dowry, unless otherwise stipulated, and husband and wife may by their marriage contract make reciprocal arrangement as to donations from one another or third persons; but dowry proper is an antenuptial arrangement, and of this dowry the husband has usually the income and management, so as to help support the charges of matrimony, though stipulations more favorable may be made on the wife's behalf.⁶ The wife's paraphernal or extra-dotal property she

343; *Peck v. Brummagim*, 31 Cal. 440; *Warfield v. Bobo*, 21 La. Ann. 466; La. Code, §§ 2316, 2393-2398; *Hussey v. Castle*, 41 Cal. 239.

¹ *Hardin v. Wolf*, 29 La. Ann. 333.

² *Jordan v. Anderson*, 29 La. Ann. 749; *Grant v. Whittlesey*, 42 Tex. 320.

³ *Graham v. Thayer*, 29 La. Ann. 75.

⁴ *Bowman v. Kaufman*, 30 La. Ann. 1021; *Elvin v. Taylor*, 30 La. Ann. 552.

The wife is permitted to mortgage her separate estate for payment of her husband's debts. *Rhodes v. Gibbs*, 39 Tex. 432. But due forms, if no separate benefit inured, must be pursued, where the wife gives any such security. *Nugent v. Stark*, 30 La. Ann. 492; *Stuffer v. Puckett*, 30 La. Ann. 811.

⁵ La. Code, § 2315; *Hannie v. Browder*, 6 Mart. 15.

⁶ La. Code, §§ 2317-2332; *Guilbeau v. Cornier*, 2 La. 6.

may manage with or without invoking her husband's assistance; his permitted participation therein is somewhat in the character of her agent, as to binding it for debt or managing it, though the risk is thus incurred of subjecting its income to the community rule; and while he should authorize its conveyance or transfer, the wife may be authorized by the judge in case of his absence or refusal.¹ The wife's tacit mortgage for her security against her husband's acts applies to both her dotal and extra-dotal property.²

§ 345. *American Community; Concluding Observations.*— On the whole, there is in the doctrine of community much that is fair and reasonable; but in the practical workings of this system it is found rather complicated and perplexing, and hence unsatisfactory; while in no part of the United States can it be said to exist at this day in full force, since husband and wife are left pretty free to contract for the separate enjoyment of property, and so exclude the legal presumption of community altogether;³ and moreover, the constant tendency of our South-western States is to remodel their institutions upon the Anglo-American basis, common to the original States and those of the Ohio valley.

¹ La. Code, §§ 2360-2367; *Stuffer v. Puckett*, 30 La. Ann. 811.

² *Id.*; *Newman v. Eaton*, 27 La. Ann. 841; *Lehman v. Levy*, 30 La. Ann. 745. After the wife has obtained and executed a separation of property from her husband, no tacit mortgage is acquired by her upon the husband's later acquisitions, as against the public. *Succession of Gayle*, 27 La. Ann. 547.

³ See *Packard v. Arellanes*, 17 Cal. 525; *Waul v. Kirkman*, 25 Miss. 609; *Succession of McLean*, 12 La. Ann. 222; *Jones v. Jones*, 15 Tex. 143; *Ex parte Melbourn*, L. R. 6 Ch. 64; La. Civil Code, §§ 2369-2405; 1 Burge Col. & For. Laws, 277 *et seq.*, where the law of community as it was about half a century ago is fully set forth; and the learned note to 2 Kent Com. 183.

PART VII.

SETTLEMENTS, ANTENUPTIAL AND POSTNUPTIAL; AND TRANSACTIONS BETWEEN HUSBAND AND WIFE.

CHAPTER I.

SETTLEMENTS IN GENERAL.

§ 346. *Nature of Settlements, Antenuptial and Postnuptial.* — Settlements are a useful contrivance for preserving estates intact in a family. As between husband and wife the word “settlement” is applied to their mutual contracts in reference to the property of one another, by means of which, under the protection of courts of equity (which favor, as did also the civil law, arrangements in recognition of property in the wife as well as the husband), they change and control the general rules of the marriage state. They cannot vary the terms of the conjugal relation itself; they cannot add to or take from the personal rights and duties of husband and wife; but they may essentially alter the interest which each takes in the property of the other, if they choose to enter into special stipulations for that purpose. These special stipulations may be either antenuptial or postnuptial; while, as we shall soon perceive, the two classes are more alike in name than substance, and the term “marriage settlements” is frequently applied to antenuptial settlements only.

§ 347. *Promises to Marry, and Promises in Consideration of Marriage.* — A distinction meets us at the outset between promises to marry and promises in consideration of marriage. The Statute of Frauds, § 4, requires that promises and agreements in consideration of marriage shall be “in writing, and

signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." Yet a promise to marry is binding, although verbal.¹ It would strike any one (except perhaps a lawyer) that a promise by a woman to marry a man in consideration of his promising to marry her was an agreement made in consideration of marriage, but it is not.² Perhaps it is public policy which sustains the latter rather than the former contract without requiring a writing. Perhaps, too, this carries weight: that a promise to marry is merely a promise to enter into a certain relation; and, therefore, clearly interpreted by any court without the aid of written evidence, provided the promise be once proved; while the Statute of Frauds is found most convenient for clearly fixing mutual stipulations which might be varied in a thousand ways, and affect the property rights of the contracting parties accordingly. At all events, a promise to marry, whether verbal or written, affords a singular remedy, one quite different from the remedies attending marriage settlements; namely, no right of specific performance, but always damages to the injured party.³

CHAPTER II.

ANTENUPTIAL SETTLEMENTS.

§ 348. **Marriage a Consideration which supports Antenuptial Settlements.** — In antenuptial marriage settlements, or what are called "marriage settlements," the marriage affords a sufficient consideration. Hence a man cannot set aside an agreement in contemplation of marriage, on the plea that his wife's fortune fell short of his expectations; for, as Lord Hardwicke observed, it would be extremely mischievous to set aside marriage settlements upon such grounds.⁴ It is the

¹ Macq. *Hus. & Wife*, 220; *Cook v. Baker*, 1 Stra. 34; *Harrison v. Cage*, 1 Ld. Raym. 386; *supra*, § 44.

² See Smith on Contracts, 57.

³ For further discussion of this topic, see next c., §§ 350, 354; *supra*, § 44.

⁴ *Ex parte Marsh*, 1 Atk. 159.

consideration of marriage, not the consideration of a corresponding fortune, which runs through the whole settlement or agreement, and supports every part of it, thus making marriage not only a high, but the highest consideration in fact known to the law.¹

In this country the validity of marriage settlements is generally recognized; and it is well understood that almost any *bona fide* and reasonable agreement, made before marriage, to secure the wife either in the enjoyment of her own property or a portion of that of her husband, whether during coverture or after his death, will be carried into execution in chancery.²

"These marriage settlements," observes Chancellor Kent, "are benignly intended to secure to the wife a certain support in every event, and to guard her against being overwhelmed by the misfortunes or unkindness or vices of her husband. They usually proceed from the prudence and foresight of friends, or the warm and anxious affection of parents; and if fairly made, they ought to be supported according to the true intent and meaning of the instrument by which they are created."³ And marriage is of itself pronounced in the supreme court of this land to be not only a valuable consideration to support a marriage settlement, "but a consideration of the highest value."⁴

§ 349. *Extent of this Support; whether the Consideration suffices as to Collateral Parties, &c.* — But this rule must be taken with some caution. The marriage consideration supports every provision with regard to the husband, the wife, and the issue. As for marriage itself, the marriage of persons for-

¹ *Ford v. Stuart*, 15 Beav. 499; *Nairn v. Prouse*, 6 Ves. 752; *Peachey Mar. Settl.* 56. As to power of appointment under a settlement, see *Webb v. Sadler*, L. R. 8 Ch. 419.

² *Stilley v. Folger*, 14 Ohio, 610; 2 Kent Com. 163; 2 U. S. Eq. Dig. Husb. & Wife, 22-30; *English v. Foxall*, 2 Pet. 595; *Hunter v. Bryant*, 2 Wheat. 32; *Tarbell v. Tarbell*, 10 Allen, 278; *Skillman v. Skillman*, 2 Beasl. 403; *Cartledge v. Cutliff*, 20 Ga. 758; *Albert*

v. Winn, 5 Md. 66; *Snyder v. Webb*, 8 Cal. 83; *Smith v. Chappell*, 31 Conn. 589.

An estate may be limited to an unmarried woman's separate use, even where no particular marriage is contemplated. *Supra*, § 198; *Haymond v. Jones*, 33 Gratt. 317.

³ 2 Kent Com. 165.

⁴ *Per Story, J.*, *Magniac v. Thompson*, 7 Pet. 348. And see *Armfield v. Armfield*, 1 Freem. Ch. 311.

merly in loose cohabitation furnishes good consideration;¹ and even perhaps a void or illegal marriage, provided that marriage was contracted with honest conjugal intent, and particularly where the question affects only their respective interests.² The consideration is held, also, to extend to step-children by a former marriage.³ It does not, however, always extend to collaterals,⁴ though Sir Matthew Hale and others held formerly that it would, maintaining that the influence of the marriage consideration extended to purchasers generally.⁵ Nor are covenants in favor of strangers supported by the marriage consideration unless specially provided for.⁶

The consideration of marriage will support a settlement against creditors, even prior ones; this, too, it would appear, though the parties both knew of the husband's indebtedness, so long as the provisions of the settlement are not grossly out of proportion to his station and circumstances;⁷ and so, too, where the party to be benefited thereby was implicated in no fraud upon the other's creditors, even though that provision be unreasonably large.⁸ But if it appear that the cele-

¹ *Herring v. Wickham*, 29 Gratt. 628.

² Even in England, upon lapse of time, a settlement deed was allowed to stand where a widower had married his deceased wife's sister. *Ayers v. Jenkins*, L. R. 16 Eq. 275.

³ *Michael v. Morey*, 26 Md. 239; *Gale v. Gale*, 6 Ch. D. 144; *Vason v. Bell*, 53 Ga. 516. But see *Price v. Jenkins*, 4 Ch. D. 483. Cf. *Ardis v. Printup*, 39 Ga. 648, with *Wollaston v. Tribe*, L. R. 9 Eq. 44, as to children of a future marriage.

⁴ *Peachey Mar. Settl.* 58, 60, and cases cited; *Davenport v. Bishop*, 1 Phil. 701; *Barham v. Earl of Clarendon*, 10 Hare, 133; *Ford v. Stuart*, 15 Beav. 505; *Cotterell v. Homer*, 13 Sim. 506; *Wollaston v. Tribe*, L. R. 9 Eq. 44.

⁵ *Jenkins v. Kemis*, 1 Ch. Cas. 108; 1 Lev. 152.

⁶ *Sutton v. Chetwynd*, 3 Mer. 249, per Sir Wm. Grant; *Sugden Law Prop.* 153; *Peachey Mar. Settl.* 61.

⁷ *Campion v. Cotton*, 17 Ves. 272;

Ex parte McBurnie, 1 De G. M. & G. 446; *Ramsay v. Richardson*, Riley Ch. 271; *Armfield v. Armfield*, 1 Freem. Ch. 311; *Jones's Appeal*, 62 Penn. St. 324; *Brunnel v. Witherow*, 29 Ind. 123; *Barrow v. Barrow*, 2 Dick. 504; *Cochran v. McBeath*, 1 Del. Ch. 187; *Credle v. Carrawan*, 44 N. C. 422.

⁸ Where no fraud upon the husband's creditors can be charged on the woman, she may hold as a purchaser for value against the husband's prior creditors, even though the settlement upon her embraced the husband's whole estate, and the marrying parties had been cohabiting while single, and had illegitimate children. *Herring v. Wickham*, 29 Gratt. 628. This is an extreme case, and perhaps some other States would not extend the rule so far. But it finds strong support from the Supreme Court of the United States in a case decided in 1881, which upheld the settlement of a large amount of real estate, in consideration of marriage, by an insolvent debtor upon the woman who accepted him, notwithstanding the

bration of marriage is part of a scheme between the marrying parties to defraud and delay creditors, such settlement will not be allowed to protect the property against just claims of the latter.¹ Where fraud has been committed by husband and wife in reference to property embraced in the terms of a settlement, the rights of a creditor with insufficient notice are sometimes upheld as against themselves; and a wife's settlement of her own property has been so far set aside as to secure payment of her antenuptial debt to the creditor.²

In *Neves v. Scott*, which came up on appeal before the Supreme Court of the United States, the rights of collaterals under a marriage agreement received consideration. And it is declared as the result of the authorities, English and American, that if, from the circumstances under which the marriage articles were entered into by the parties, or as collected from the face of the instrument itself, it appears to have been intended that the collateral relatives, in a given event, should take the estate, and a proper limitation to that effect is contained in them, a court of equity will enforce the

latter knew he was financially embarrassed. *Prewit v. Wilson*, 103 U. S. Supr. 22. The court, relying upon its belief that the woman, nevertheless, did not know of the man's insolvency, and did not participate in his fraudulent intent upon his creditors, asserted very strenuously, by Mr. Justice Field, the high value of marriage as a consideration for such a conveyance. But, it might be asked, is it not straining a point, as to the sanctity and immutability of the marriage union, to imagine woman as bargaining her person literally for the sake of a certain piece of property? Admitting marriage to be a consideration of the highest value, and one which cannot be recalled on failure of such a bargain, ought mere mercenary considerations to control when such contracts ought to be for better or for worse, for love and personal esteem, and not money alone? It may be allowed that prior creditors cannot attack a deed executed for valuable consideration without knowledge

by the grantee of the grantor's fraudulent intent; and yet why fraudulent knowledge should not be inferred from facts tending to establish it in all cases, or why "the clearest proof of the wife's participation" should be required, seems, apart from positive and final decision, a fair subject for legal dispute.

Where the intended wife was a foreigner, who understood the English language imperfectly, the settlement was held good upon her and her children, notwithstanding the husband's insolvency and false recitals in the deed, her own ignorance of the fraud being shown. *Kevan v. Crawford*, 6 Ch. D. 29.

¹ *Columbine v. Penhall*, 1 Sm. & Gif. 228; *Goldsmith v. Russell*, 5 De G. M. & G. 555; *Peachey Mar. Settl.* 63; *Simpson v. Graves*, Riley Ch. 232.

² *Sharpe v. Foy*, L. R. 4 Ch. 35; *Smith v. Chirrell*, L. R. 4 Eq. 390; *Chubb v. Stretch*, L. R. 9 Eq. 555; *Obermayer v. Greenleaf*, 42 Mis. 304; *Brame v. McGee*, 46 Ala. 170.

trust for their benefit. They will not be regarded as volunteers outside of the deed, but as coming fairly within the influence of the consideration on which it is founded; the consideration extending, in fact, through all the limitations for the benefit of the remotest persons provided for consistent with law.¹

§ 350. **Settlement Good in Pursuance of Agreement before Marriage.**—If an agreement be made in writing before marriage, for the settlement of an estate, the settlement, although made after marriage, will be deemed valuable.² This is a well-settled rule, and should be constantly borne in mind.

There are *dicta* to the effect that a settlement after marriage, reciting a parol agreement before marriage, is not fraudulent against creditors, provided the agreement had actual existence; but this point has never been distinctly decided in England; and some late authorities appear to doubt its correctness.³ The payment of money would, however, make a good consideration for such a settlement as against subsequent creditors.⁴ The language of the Statute of Frauds has a material bearing upon all such cases. Yet very informal agreements are often sustained, rather on liberal than technical construction, the court taking into consideration the fact that marriage had taken place, or other acts been performed, on the strength of the promise.⁵

The disposition of equity courts in the United States is favorable to settlements after marriage in pursuance of some informal prior agreement, particularly as relates to personal property and as between the spouses themselves. Other considerations, such as forbearance to sue or the fulfilment in

¹ *Neves v. Scott*, 9 How. 196; *ib.* 13 How. 268. And see *Eaton v. Tillinghast*, 4 R. I. 276; *Buchanan v. Deshon*, 1 Har. & G. 280; *De Barranti v. Gott*, 6 Barb. 492; *Wallace v. McCullough*, 1 Rich. Eq. 426; *Parsons v. Ely*, 45 Ill. 282; *Mitchell v. Moore*, 16 Gratt. 275.

² *Reade v. Livingston*, 3 Johns. Ch. 481; *Finch v. Finch*, 10 Ohio St. 501; *Izard v. Izard*, 1 Bailey Ch. 228; *Davidson v. Graves*, Riley Ch. 219; *Satterthwaite v. Emley*, 8 Green Ch. 439; *Rogers v. Brightman*, 10 Wis. 55; *Peachey Mar. Settl.* 63; *Sugd. Vend.*

& *Purch.* 13th ed. 590; *Macq. Hus. & Wife*, 257.

³ See *Peachey Mar. Settl.* 63; *Lassence v. Tierney*, 1 Mac. & Gor. 571; *Warden v. Jones*, 5 W. R. 447. And see *Babcock v. Smith*, 22 Pick. 61; *Simpson v. Graves*, Riley Ch. 232.

⁴ *Stillman v. Ashdown*, 2 Atk. 478; *Brown v. Jones*, 1 Atk. 189. And see *Butterfield v. Heath*, 15 Beav. 414.

⁵ See *Livingston v. Livingston*, 2 Johns. Ch. 481; *Resor v. Resor*, 9 Ind. 347; *Brooks v. Dent*, 1 Md. Ch. 523; *West v. Howard*, 20 Conn. 581.

return of terms prejudicial, might intervene.¹ A mere oral agreement between the intended husband and wife, followed by marriage and a continued recognition by acts, especially in connection with such other consideration, is held sufficient for the wife's favor in some late American cases, as between the parties and those claiming under them;² and it has been suggested that even though the parol antenuptial agreement might be inoperative under the Statute of Frauds, it might tend to prove that one spouse, by consistent subsequent conduct, intended to relinquish all claim upon the specific property to which that agreement referred.³

§ 351. *Form of Antenuptial Settlements; Liberal Effect given to Intent.* — With respect to the form of marriage settlements it may be generally observed that equity pays no regard to the externals, but considers only the substantial intention of the parties; and hence articles or an agreement will be binding between husband and wife without the intervention of trustees; for here the husband himself may be bound to act as trustee.⁴ A strong instance of the liberality of the equity courts in this respect was afforded in an early decision by Lord Keeper Wright. The intended husband gave the in-

¹ *Riley v. Riley*, 25 Conn. 154; *Bradley v. Saddler*, 54 Ga. 681. See, as to the like English practice, *Peachey Mar. Settl.* 74, 87; *Macq. Hus. & Wife*, 234; *Hammersley v. De Biel*, 12 Cl. & Fin. 45; *Lassence v. Tierney*, 1 Mac. & Gor. 571.

The numerous *dicta* in all such cases serve rather to obscure than illustrate the principle.

² *Southerland v. Southerland*, 5 Bush, 591; *Child v. Pearl*, 48 Vt. 224; *Bradley v. Saddler*, 54 Ga. 681. But see *Davenport v. Karnes*, 70 Ill. 465; registry statutes, *post*.

³ So ruled in the wife's favor in *Sanford v. Atwood*, 44 Conn. 141. But a woman's promise to a man, that if he will marry her and will make certain improvements on her land, she will convey the land to him, is "an agreement in consideration of marriage," which by the Ohio Statute of Frauds, must be in writing. Neither marriage,

nor making the improvements, is a part-performance such as takes the case out of the statute. *Henry v. Henry*, 27 Ohio St. 121. In Georgia an oral promise to settle property upon an intended wife is void. *Lloyd v. Fulton*, 91 U. S. Supr. 479. Cf. *Bradley v. Saddler*, 54 Ga. 681. The woman's promise before marriage to release a judgment recovered against the man is required to be in writing under the Indiana Statute of Frauds, as an agreement "in consideration of marriage." *Flenner v. Flenner*, 29 Ind. 564. And the marriage celebration is not part-performance in the husband's favor. *Id.*

An expectancy as devisee of one yet living may be settled on marriage. *Estate of Wilson*, 2 Penn. St. 325.

⁴ *Peachey Mar. Settl.* 65; *Macq. Hus. & Wife*, 242; *Logan v. Goodall*, 42 Ga. 95. But see *Dillaye v. Greenough*, 45 N. Y. 438.

tended wife a bond conditioned to leave her £1,000 if she should survive him. They married, and of course the bond became void at law. But it was held that in equity this should subsist as an antenuptial agreement.¹ Even in law a bond, with conditions properly expressed, may be enforced against the husband to the extent of the penalty therein named; yet equity, regarding the contract as one for specific performance, will not confine the remedy of the injured party to the penal sum named in the bond; but, enforcing the real obligations of the bond, will give, if need be, thirty times that sum to her who married on the strength of it. Such is the advantage of equity over the law.² And hence the signature of the wife to an instrument, or an indenture deed, is by no means indispensable in order that her rights upon marriage consideration be sustained.³

§ 352. *Marriage Articles; Letters, &c., preliminary to Settlement Deed.*—In this connection the use of the term “marriage articles” is properly to be noticed. “When promises and agreements in consideration of marriage,” says Mr. Macqueen, “are meant to become the groundwork of settlements, they are called marriage articles. They are often drawn up hastily, and signed on the eve of the nuptial ceremony from want of time to prepare a final deed; which, however, when ultimately executed, if it be in strict conformity with the articles, will supersede them.”⁴ The American rule is favorable to marriage articles, although unskillfully drawn, so long as they are *bona fide* articles, and the party marrying upon their faith had good reason to rely upon them as such.⁵ Any settlement made after marriage, in pursuance of marriage

¹ *Acton v. Pierce*, 2 Vern. 480; *Bryant*, 2 Wheat. 82; *Freeman v. Hill*, *Croswaigh v. Hutchinson*, 2 Bibb, 407; 1 Dev. & Bat. Eq. 389; *Caldwin v. Liles v. Fleming*, 1 Dev. Eq. 185; *Kenly v. Kenly*, 2 How. (Miss.) 751.

² See *Prebble v. Boghurst*, 1 Swan. 309, before Lord Eldon, cited in *Macq. Hus. & Wife*, 243 *et seq.*; *Cannel v. Buckle*, 2 P. Wms. 242; *Rippon v. Dawding*, Ambl. 565; *Peachey Mar. Settl.* 65. Bonds have been frequently enforced in this country as constituting a marriage settlement. *Aucker v. Levy*, 3 Strobh. Eq. 197; *Hunter v.*

³ *Cochran v. McBeath*, 1 Del. Ch. 187.

⁴ *Macq. Hus. & Wife*, 246.

⁵ *Neves v. Scott*, 9 How. 196; *Hooks v. Lee*, 8 Ired. Eq. 157; *Rivers v. Thayer*, 7 Rich. Eq. 136; *Kinnard v. Daniel*, 13 B. Monr. 496; *Montgomery v. Henderson*, 3 Jones Eq. 113; *Smith v. Moore*, 3 Green Ch. 485; *Potts v. Cogdell*, 1 Desaus. 456.

articles, or what may be construed as such, receives the full support of the marriage consideration, and must prevail accordingly against creditors, purchasers and each of the married parties.

Letters or a correspondence before marriage may establish an antenuptial settlement where they sufficiently furnish the terms of the agreement. And so, too, may they constitute marriage articles and support a settlement made in pursuance of their terms.¹ But the authenticity of such correspondence should be well established, so easy is such proof manufactured to suit emergencies; and certainly where the contest is between the married pair and a husband's creditors, the true date of the letters should be proved, or else that they were duly received before the marriage.² Nor will performance be decreed, unless it can be gathered from a fair interpretation of the letters that they imported a concluded agreement, and induced the marriage; nor if it be doubtful whether what passed was not mere negotiation, or a gratuitous offer by the one, which the other never accepted nor meant to rely upon.³

§ 353. **Marriage Settlement by Father or Other Third Party.**—Promises made in consideration of the marriage by a third party, such as the wife's father, may afterwards be enforced against him, as (in such an instance) by the husband. But it must appear that the latter knew of the promise, and that it entered as an ingredient into the marriage; and the husband cannot, upon finding, after marriage, that his wife, while single, had received a letter from her father promising a certain allowance, hold the latter to specific performance.⁴ The promise of a third party may be for the wife's benefit; or it may be for the mutual benefit of the married parties, and enforceable accordingly. Thus, in a recent English case the estate of a father was held bound by his written statements

¹ *Logan v. Wienholt*, 1 Cl. & Fin. 496; *Montgomery v. Henderson*, 3 Jones 611; *Hammersley v. De Biel*, 12 Cl. & Fin. 45; *Moorhouse v. Colvin*, 15 Beav. 496.

² *Fowle v. Freeman*, 9 Ves. 315; *Card v. Jaffray*, 2 Sch. & Lef. 384; *Kinnard v. Daniel*, 13 B. Monr. 496; *Chambers v. Sallie*, 29 Ark. 407.

³ *Kinnard v. Daniel*, 13 B. Monr. 496. ⁴ *Ayliffe v. Tracy*, 2 P. Wms. 66; *Madox v. Nowlan, Beatty*, 682.

of intention to settle the whole of his property upon his daughter, on the strength of which she married; and this, notwithstanding the father, being at the time a widower, remarried afterwards and left a widow.¹

Courts of equity have frequently refused, however, to enforce marriage agreements on the ground of their being inconsistent, uncertain, and unintelligible;² and particularly is this found true of loose expressions contained in letters written by relatives of the married parties, upon which the attempt is made to render them chargeable when the marriage was not thereby induced.³

It is held that a marriage settlement may bind a wife on the ground that she has assented to the father's arrangement, even though the husband's engagement was to settle what was not his, but hers, and hence was not beneficial to her.⁴

§ 354. *Statute of Frauds affecting Promises "in Consideration of Marriage."* — Under the English Statute of Frauds, and similar enactments in various American States, promises "in consideration of marriage" are required to be in writing; and hence an oral promise to settle property upon an intended spouse is void.⁵

Cases have arisen, however, under the Statute of Frauds, where the marriage agreement had been reduced to writing, but not signed, and yet letters passed afterwards between the parties, referring to the agreement, which sufficed to establish it. In a case of this character, decided in 1791, Lord Thurlow expressed the opinion that if a letter refers so clearly to an agreement as to show what was meant by the parties, that may take the case out of the statute.⁶ Lord Eldon states that though the agreement be not signed, yet if the

¹ *Coverdale v. Eastwood*, L. R. 15 Eq. 121; a harsh case, truly.

² *Franks v. Martin*, 1 Eden, 809; *Kay v. Crook*, 3 Jur. n. s. 107; *Peachey Mar. Settl.* 68; *Quinlan v. Quinlan*, *Hayes & Jones*, Ir. Rep. 785; *Maunsell v. White*, 1 Jo. & Lat. 539.

³ *Hincks v. Allen*, 28 W. R. 533. As to carrying out the wishes of a third party respecting property devised so as to settle it upon marrying, see

Teasdale v. Braithwaite, 5 Ch. D. 630.

⁴ See *Lee v. Lee*, 4 Ch. D. 175.

⁵ *Tawney v. Crowther*, 3 Bro. C. C. 263; *Coles v. Trecothick*, 9 Ves. 250; *supra*, § 850; *Lloyd v. Fulton*, 91 U. S. Supr. 479; *Fletcher v. Fletcher*, 29 Ind. 569; *Henry v. Henry*, 27 Ohio St. 121.

⁶ *Tawney v. Crowther*, 3 Bro. C. C. 263. See citation of this opinion in *Jorden v. Money*, 5 H. L. 253.

letter contain all the terms and describes the consideration, and all the circumstances, so that by the contents of the letter it can be connected and identified with the agreement, there is a writing which amounts to a note or memorandum, and so satisfies the statute.¹ In general, a letter which contains the terms of an agreement, or refers to another paper which specifies the terms, is sufficient to take the contract out of the Statute of Frauds.²

§ 355. *Authenticity of Settlement must be established.*—Antenuptial agreements are so liable to misapprehension and fraud, that they will not be enforced in equity unless the court is satisfied that they were made, and that the marriage consideration really entered into the contract.³ If in the form of a writing, due delivery should appear; though if the written contract be produced from the proper custody, and its execution proved, proper delivery is readily presumed.⁴ Where duly made and delivered, such settlements may be cancelled; but whether a mutilated instrument was intentionally cancelled or not is matter for proof.⁵

The result of a long array of diffuse, but exceedingly interesting, English equity decisions under this head, appears to have been to establish the following propositions: *First*, that if any one make a representation to another on which he would reasonably act, the party making the representation is bound thereby, and cannot recede from it; in other words, that a man who, by his deliberate assertion, induces another to enter into obligations, cannot afterwards, by his acts, negative the truth of that assertion.⁶ *Second*, that moral obligations in matters of this description are treated in courts of equity as coextensive with legal obligations; and that while vague and ambiguous representations may be made to persons

¹ *Coles v. Trecothick*, 9 Ves. 250.

² *Hammersley v. De Biel*, 12 Cl. & Fin. 45; *Moorhouse v. Colvin*, 15 Beav. 349; *Peachey Mar. Settl.* 67.

³ *Coles v. Trecothick*, 9 Ves. 250; *Franks v. Martin*, 1 Eden, 309; *Kay v. Crook*, 3 Jur. n. s. 107; *Montgomery v. Henderson*, 3 Jones Eq. 113; *Peachey Mar. Settl.* 68; *Kinnard v. Daniel*, 13 B. Monr. 496.

⁴ In *Smith v. Moore*, 3 Green Ch. 485, the document being found in the husband's possession after his death, execution proved, and also his recognition during his lifetime, due delivery was presumed.

⁵ *Barclay v. Waring*, 58 Ga. 86.

⁶ *Money v. Jorden*, 15 Beav. 377; *Pulford v. Richards*, 17 Beav. 94.

on marriage, which are only morally binding upon the person making them, though creating reasonable expectation and belief of advantage in the minds of the marrying parties; yet, where the matter is clearly and distinctly expressed and, presumably, relied upon, then the legal obligation follows the moral obligation, and the contract will be enforced by the courts.¹

§ 356. **Whether Trustee must be designated; Trustee's concurrence.** — Under modern rules of separate use,² a valid marriage settlement may be made without the designation of a trustee, though in such contracts, when drawn up with due formality, trustees are commonly interposed outside the marriage relation, however, who hold the legal title; and such is unquestionably the more prudent arrangement.³ The probate courts in this country frequently have jurisdiction in the appointment of such trustees to fill vacancies, as in cases of any testamentary trust,⁴ though the general supervision remains with chancery. When trustees are interposed, their concurrence in the disposition, by either or both spouses, is not essential, unless, as such instruments usually provide, their assent is made requisite.⁵

§ 357. **Secret Settlement or Transfer in Fraud of Intended Spouse.** — A secret settlement made by a woman upon third persons, while engaged, and contemplating marriage, is liable to be set aside in equity as a fraud upon the marital rights of her intended husband, at the husband's instance, when he learns of it. *Prima facie*, her transactions as a *feme sole* with reference to her own property are valid both at law and in equity; it is only because of the fraud that her husband can afterwards obtain relief against them; yet the English courts have gone far in discountenancing all conveyances made by the intended wife in derogation of the property rights of her intended husband, where made without notice to

¹ *Bold v. Hutchinson*, 20 Beav. 259; *Peachey Mar. Settl.* 87.

² *Supra*, §§ 191, 351; *Cochran v. McBeath*, 1 Del. Ch. 187; *Peachey Mar. Settl.* 260.

³ *Haymond v. Lee*, 33 Gratt. 817.

⁴ *Bassett v. Crafts*, 129 Mass. 513.

⁵ See *Essex v. Atkins*, 14 Ves. 547; *Justis v. English*, 30 Gratt. 565; *Braune v. McGee*, 50 Ala. 359; *Peachey Mar. Settl.* 261; *Haymond v. Lee*, 33 Gratt. 817; *supra*, § 250; *Wallace v. Wallace*, 82 Ill. 630; *Coatney v. Hopkins*, 14 W. Va. 338.

him.¹ The secrecy of the proceeding is a material element, from which fraud will be inferred.² The husband must have been kept in ignorance of the transaction up to the moment of marriage. For, as Lord Chancellor Brougham once observed, if a man, knowing what has been done, still thinks fit to marry the lady, he cannot be permitted to allege afterwards that he has been deceived.³ Actual concurrence on the part of the intended husband in his wife's settlement will be even more conclusive against him; and, even though he were a minor, will preclude all subsequent allegations of fraud on the marital right.⁴ It is the usual practice with English conveyancers at the present day to make the intended husband a party to all instruments executed by the intended wife in contemplation of or during a treaty of marriage.⁵

The same general doctrine has been repeatedly declared in the courts of this country; and secret and voluntary conveyances, made by a woman contemplating marriage, may be set aside on the husband's subsequent application as a fraud upon his marital rights,⁶ under the same qualification that the intended spouse was thereby defrauded.⁷ Nor need she have formally settled her whole property in order to come within the prohibition; any voluntary transfer, under fraudulent circumstances, is void, so far as that particular property is concerned.⁸ But if the husband received notice of the transfer before marriage, and chose to marry her notwithstanding, he is without a remedy.⁹ Though not where he

¹ *Peachey Mar. Settl.* 142, and cases cited; *Doe d. Richards v. Lewis*, 11 C. B. 1035; *St. George v. Wake*, 1 Myl. & K. 610; *Countess of Strathmore v. Bowes*, 1 Ves. Jr. 28; *Macq. Hus. & Wife*, 36; *England v. Downes*, 2 Beav. 522; *Howard v. Hooker*, 2 Ch. Rep. 81; 1 Eq. Cas. Ab. 59, pl. 1; *Lance v. Norman*, 2 Cas. in Ch. Rep. 79; 1 Eq. Cas. Ab. 59, pl. 2; *Carleton v. Earl of Dorset*, 2 Vern. 17; *Goddard v. Snow*, 1 Russ. 485.

² *England v. Downes*, 2 Beav. 522; *Macq. Hus. & Wife*, 36.

³ *St. George v. Wake*, 1 Myl. & K. 610; *Peachey Mar. Settl.* 145, and cases cited.

⁴ *Slowcombe v. Glubb*, 2 Bro. C. C. 545.

⁵ *Peachey Mar. Settl.* 155.

⁶ 2 Kent Com. 174, 175, and notes, 12th ed.; *Spencer v. Spencer*, 3 Jones Eq. 404; *Tucker v. Andrews*, 13 Me. 124, 128; *Williams v. Carle*, 2 Stockt. 543; *Freeman v. Hartman*, 45 Ill. 57; *Baker v. Jordan*, 78 N. C. 145; *Hall v. Carmichael*, 8 Baxt. 211.

⁷ *Gregory v. Winston*, 28 Gratt. 102.

⁸ *Fletcher v. Ashley*, 6 Gratt. 332.

⁹ *Cheshire v. Payne*, 16 B. Monr. 618; *Terry v. Hopkins*, 1 Hill Ch. 1. See 1 Story Eq. Juris. § 403. And see *Cole v. O'Neill*, 3 Md. Ch. 174; *O'Neill v. Cole*, 4 Md. 107.

merely heard a vague rumor after he had married.¹ On this principle the wife's antenuptial deed, purporting to convey her property in trust for her separate use, has been treated as fraudulent.²

Lord Thurlow says the question in all such cases is whether the evidence is sufficient to raise fraud.³ And from the decisions it would appear that some alienations of the wife's property, without her intended husband's knowledge, will be allowed to stand.⁴ The facts are always open to inquiry; and it seems settled that the court is warranted in considering such circumstances as the meritorious object of the conveyance and the situation of the husband in point of pecuniary means.⁵

If the wife's transfer or conveyance to another, under such circumstances, be without valuable consideration to herself, there is the less reason why equity should uphold it;⁶ and if it be in plain derogation of her own interests, as, for instance, to some insolvent relative to hold in trust for her, or so as to suggest that fraud or coercion was practised upon her, it is for the common nuptial interests that courts of chancery repudiate the arrangement altogether.⁷ By virtue of late statutory changes, tending to relieve a husband of his wife's antenuptial debts, or of other common-law burdens, on her account, the husband may sometimes stand in equity on the stronger footing of a defrauded creditor, where he seeks to have the secret conveyance of his affianced set aside in his favor.⁸

From what has been said it may readily be gathered that

¹ *Spencer v. Spencer*, 3 Jones Eq. 404. But see, as to registration, *infra*; and *Peachey Mar. Settl.* 155.

² *Belt v. Ferguson*, 3 Grant, 289. And see *Duncan's Appeal*, 43 Penn. St. 67.

³ *Strathmore v. Bowes*, 1 Ves. Jr. 28.

⁴ *Taylor v. Pugh*, 1 Hare, 618; 2 Roper Hus. and Wife, 162; *Peachey Mar. Settl.* 147.

⁵ *St. George v. Wake*, 1 Myl. & K. 610; *King v. Cotton*, 2 P. Wms. 674. And see *Thomas v. Williams*, Mosely, 177; *Blanchet v. Foster*, 2 Ves. Sen.

264; *Anonymous*, 84 Ala. 430; *Taylor v. Pugh*, 1 Hare, 614; *Lewellin v. Cobbold*, 1 Sm. & Gif. 376; *Peachey Mar. Settl.* 151.

⁶ *Baker v. Jordan*, 78 N. C. 145; *Fletcher v. Ashley*, 6 Gratt. 332.

⁷ *Hall v. Carmichael*, 8 Baxt. 211.

⁸ *Westerman v. Westerman*, 25 Ohio St. 500. But the fact of an antenuptial settlement does not relieve the husband from his common-law liability for antenuptial debts, apart from statute. *Powell v. Manson*, 22 Gratt. 177. And see *supra*, §§ 90, 822.

a secret settlement by the intended wife, made before she was courted, is not likely to be set aside, on proof that the complainant commenced courting her afterwards.¹ And the husband must show, not only that the wife contemplated marriage with some person at the time of the settlement, but that he was the person intended.²

A corresponding rule as to fraud would, doubtless, apply to a husband, who, before marriage, had made a secret transfer or conveyance of his own property to his wife's injury; not, however, without regard to the difference which subsists at law between their marital rights in each other's property.³ Indeed, it is sometimes said that any designed and material concealment ought to avoid an antenuptial contract at the will of the party who has been thereby injured.⁴

§ 358. *Reforming Settlements framed on Marriage Articles, &c.*—Marriage articles, to make a settlement of real property, should be drawn up only in extreme cases; though in the case of personalty, more latitude may be allowed; and when drawn up they should leave as little to construction as possible. Yet marriage articles are frequently prepared in great haste, and many questions must necessarily arise as to the intention of the parties; these the courts of equity endeavor to meet by adopting the intention of the parties as their true guide, and taking it for granted that the articles are merely minutes which the settlement may explain more at large, but which are not to be literally followed.⁵

The general rule as to reforming settlements framed upon antenuptial articles is thus laid down by Lord Chancellor Talbot:⁶ "Where articles are entered into before marriage, and settlement made after marriage, differing from the articles,

¹ *King v. Cotton*, 2 P. Wms. 674.

⁴ *Kline v. Kline*, 57 Penn. St. 120;

² *England v. Downes*, 2 Beav. 522; *Peachey Mar. Settl.* 15; *Macq. Hus. & Wife*, 37; *Strathmore v. Bowes*, 1 Ves. Jr. 22. And see *Waters v. Tazewell*, 9 Md. 291.

Kline's Estate, 64 Penn. St. 123.

³ See *Leach v. Duvall*, 8 Bush. 201; *Gainor v. Gainor*, 26 Iowa, 337. Lapse of time and other circumstances may remove any presumption of fraud or unfairness on his part. *Butler v. Butler*, 21 Kan. 521.

⁵ *Peachey Mar. Settl.* 89-97; *Macq. Hus. & Wife*, 257; *Trevor v. Trevor*, 1 P. Wms. 631; *Blandford v. Marlborough*, 2 Atk. 545; *Rochfort v. Fitzmaurice, Dru. & War.* 18. But see *Breadalbane v. Chandos*, 2 Myl. & Cr. 711.

⁶ *Legg v. Goldwire, Forrester*, 20; *Macq. Hus. & Wife*, 259.

this court will set up the articles against the settlement." That is to say, the court will order the settlement to be reformed. Where both the articles and the settlement are prior to the marriage, at a time when all the parties are at liberty, the settlement differing from the articles will be taken as a new agreement between them, and the articles will be controlled accordingly.¹ For the discrepancy will be presumed to have arisen from some change of mutual intention, while matters remained open. But this rule is not invariable, according to the later authorities; for any clear and satisfactory evidence may be introduced to show that the discrepancy had arisen from a mistake.² Where the settlement expressly declares that it is made in terms of the articles, and yet differs from them, the settlement will be reformed, so as to correspond with the articles. This is no contradiction of the general rule; for where the settlement is expressly mentioned to be made in pursuance of the marriage articles, the intention of the parties is by writing shown to be the same as when the articles were drawn, and must be construed accordingly. And curiously enough in an English case under this head, though the settlement followed the precise words of the marriage articles, the court reformed it, in order to carry out the actual intention of the parties.³

Marriage articles under which parties agree to make a settlement and yet fail to do so, may, apart from the partial performance which marriage might be said to establish, afford one the right to damages as against the other.⁴

§ 359. **Portions and Provisions for Children, &c.** — Many deeds of settlement provide what are called "portions." The word "portion" may be used to denote what the wife brings her husband in marriage, and in this sense it corresponds with the word *dote* at the civil law, or what we sometimes call her dowry. But in its more special acceptation, the word "portion" signifies that part of a person's estate which is given or left to a child. Marriage settlements usually contain some

¹ *Legg v. Goldwire, Forrester*, 20; *v. Hutchinson*, 2 Jur. n. s. 97; 5 De G. Peachey Mar. Settl. 134. M. & G. 567.

² See *Peachey Mar. Settl.* 135; *Bold*

³ *West v. Errissey*, 2 P. Wms. 350.

⁴ *Jeston v. Key*, L. R. 6 Ch. 610.

provision to secure portions for the children of the marriage.¹ Double portions may sometimes be created for children; as if a father should make a provision for a child by marriage settlement, and afterwards provide for the same child by will; but the presumption is always against such an intent, and in favor of regarding the latter as a substitute for the former.² So favorably are issue regarded in such instruments, that, it is held, an intention to provide for the offspring of the marriage should be presumed, unless the language of the settlement plainly indicates otherwise.³

§ 360. **Mistakes, Fraud, Improvidence, &c., in Marriage Settlements.**—Mistakes in marriage settlements, either through error or fraud, will in general be corrected in equity; the principle being that the parties are to be placed in the same situation in which they would have stood, if the error to be corrected, or the fraud, had not been committed.⁴ Rectification may be made in a proper case, though one of the spouses has already died.⁵

Owing, moreover, to the confidential relation which subsists between the parties, an antenuptial contract which appears to have been unfairly procured, will be set aside; and one whose terms are grossly inequitable, especially if involving unreasonable sacrifice of the wife's rights, can only be sustained upon very clear proof of concurrent intent.⁶

¹ Wood v. Briant, 1 Atk. 522. For a full discussion of this topic, see Peachey Mar. Settl. 409 *et seq.*, and cases cited.

² *Ex parte* Pye, 18 Ves. 147; Peachey Mar. Settl. 492 *et seq.*, and cases cited; Earl of Durham v. Wharton, 3 Cl. & Fin. 155; Russell v. St. Aubyn, L. R. 2 Ch. D. 398. But the Scotch rule of construction is otherwise. Kippen v. Darley, 8 Macq. 203. Provision for the son of a former marriage held purely voluntary as against a purchaser for valuable consideration. Price v. Jenkins, 4 Ch. D. 483, and cases cited. But children of a former marriage are favored in Gale v. Gale, 6 Ch. D. 144. And see Vason v. Bell, 53 Ga. 416.

³ Wallace v. Wallace, 82 Ill. 430.

⁴ Rooke v. Lord Kensington, 2 Kay & Johns. 770; Peachey Mar. Settl. 565, 576; Alexander v. Crosbie, Lloyd & Goold, temp. Sugd. 149; Sanderson v. Robinson, 6 Jones Eq. 155; Love v. Graham, 25 Ala. 187; Reade v. Armstrong, 7 Irish Eq. x. s. 381; Walker v. Armstrong, 2 Jur. x. s. 962; Brown v. Bonner, 8 Leigh, 1; Ball v. Storie, 1 Sim. & Stu. 210, 219; Cook v. Fearn, 27 W. R. 212; Brown v. Brown, 31 Gratt. 502; Russell's Appeal, 75 Penn. St. 269.

⁵ Burge v. Burge, 45 Ga. 801.

⁶ Pierce v. Pierce, 71 N. Y. 154; Daubenspeck v. Biggs, 71 Ind. 255; Pond v. Skeen, 2 Lea, 126; Russell's Appeal, 75 Penn. St. 269.

Equity, moreover, sometimes refuses to enforce an antenuptial settlement, as between husband and wife, not only because of its fraudulent character as regards the one or the other party, but on the ground that it is improvident. Yet relief of this sort is rarely afforded, and especially so where a third party, or the husband, not the wife, seeks it.¹ And while the intended wife may, perhaps, in an extreme case, be relieved from an antenuptial contract which bears very harshly upon her property rights, as though defrauded and deceived in the arrangement, there is no doubt that where she is of competent age she may bargain away her rights quite extensively under a marriage contract, as her husband likewise could have done; provided, of course, that her deliberate intention to do so be made manifest; and in this state of the law it certainly becomes a matter of serious question what these fundamental property rights may be which spouses ought not reciprocally to relinquish.

§ 361. *Construction of Antenuptial Marriage Settlements; Intent upheld, &c.*—In the construction of these marriage settlements, the courts exhibit a propensity to change, as property doctrines change in this connection; but on the whole to incline to that construction, in case of doubt, which renders the arrangement mutually beneficial and, as far as possible, upholds marital rights of property as adjusted by public policy. A reserved power in the one to alter or revoke, or to dispose differently from the original settlement to the detriment of the other, will not be readily inferred from the terms of the contract.² As to children embraced under such arrangements, an equal distribution among them and equality of benefits, as American policy favors, should be preferred in courts of this country, as well as the preservation of their legal rights whatever the compact of parents with one another.³

The true intention of the parties, as in wills and trusts gen-

¹ *Everitt v. Everitt*, L. R. 10 Eq. 405; *Dillaye v. Greenough*, 45 N. Y. 438.

² *Yeaton v. Yeaton*, 4 Ill. App. 579.

Such reservations, however, as *e. g.*, to dispose by will, if made must be re-

spected. *Bishop v. Wall*, 3 Ch. D. 194; *Rogers v. Cunningham*, 51 Ga. 40; *Russell's Appeal*, 75 Penn. St. 269; *Reynolds v. Brandon*, 3 Heisk. 593.

³ *Brown v. Brown*, 31 Gratt. 502; *Phelps v. Phelps*, 72 Ill. 545.

erally, is the primary rule in the construction of all marriage settlements; subject to which rule the ordinary meaning should be given to written words, unless manifest absurdity or inconvenience will follow; no power resting in the court to strain language beyond its fair significance.¹ Where several articles are to be considered in such an instrument, the usual rules of interpretation are applied.²

§ 362. *Construction of Special Clauses.* — An instrument in the form of a marriage settlement or similar writing, by which a husband renounces certain marital rights in favor of his intended wife, or of her and her children, cannot operate by itself as restraining her own equitable rights in her property.³ So strongly is the trust created upon the marriage consideration upheld against either spouse, that the husband's conversion of his wife's income thus settled to her separate use gives the wife a claim which she can enforce against his estate upon surviving him, notwithstanding the settlement upon her was stated to be in lieu of all dower and distributive share, and her husband's will made ample provision for her notwithstanding.⁴ And on the other hand, under a marriage settlement, though it be of all the woman's property, which confines the income to herself during life, the trust must continue even upon her widowhood; for, as it is observed, a spendthrift trust may be created as well for a woman as a man.⁵ But settlements, as properly construed, provide more frequently that upon the dissolution of marriage the survivor shall have the same rights as though the instrument had not been made.⁶

¹ *Peachey Mar. Settl.* 457, 523, 532; *Hoare v. Hornby*, 2 *Yo. & Coll. C. C.* 129; *Reid v. Kenrick*, 1 *Jur. n. s.* 898; *Carswell v. Schley*, 56 *Ga.* 101; *Mintier v. Mintier*, 28 *Ohio St.* 307. And see *Creighton v. Clifford*, 6 *Rich.* 188; *Burgin v. McDowell*, 30 *Gratt.* 236.

² *Estate of Baubichon*, 49 *Cal.* 18.

³ *Bass v. Wheelless*, 2 *Tenn. Ch.* 531.

⁴ In such case, *semble*, the provision under the husband's will is to be construed as in lieu of all such claim on the widow's part, so that she may accept it or pursue the claim instead. *Boardman's Appeal*, 40 *Conn.* 169.

Under the trusts of a marriage contract profits and income belong usually to the wife, under the equitable rules of separate property noted, *supra*, Part V., and do not become part of the *corpus* of the trust fund, with its reversion or survivorship of rights, unless so provided. See *Artope v. Goodall*, 53 *Ga.* 318.

⁵ *Ashhurst's Appeal*, 77 *Penn. St.* 464. And see *Greensboro' Bank v. Chambers*, 30 *Gratt.* 202.

⁶ See *Woods v. Richardson*, 117 *Mass.* 276.

§ 363. **Clauses barring Rights of Survivor.**—As to the rights of surviving husband or wife, too, in the deceased spouse's property, the obvious inclination must be not to disturb the usual laws of inheritance and distribution, but rather to presume that the marriage settlement contemplates rights of property as limited to the duration of the marriage relation.¹ Yet clauses providing for the contingency of death and survivorship receive in these times not unfrequent consideration from American courts of equity; and it is properly held that clauses debarring or restraining the wife,² or the husband,³ or both,⁴ as to the usual rights of inheritance, such as dower, curtesy, and the distributive share, ought to be clearly expressed and carefully established in proof in order to prevail; notwithstanding which, it is clear that deliberate concurrent intention settles such issues, and that in general, husband and wife may thus mutually agree that the one, the other, or the two reciprocally, shall claim no interest in the property of the one who shall die first;⁵ and may even exclude all right to administer.⁶

Antenuptial provisions in lieu of the usual rights by survivorship deserve more favor, such as an equitable jointure in bar of dower;⁷ or where otherwise rights of property are conferred equivalent to the rights which were taken away.⁸

¹ *Pierce v. Pierce*, 71 N. Y. 154; *Hays v. Bright*, 11 Heisk. 325.

² *Pierce v. Pierce*, 71 N. Y. 154.

³ *Daubenspeck v. Biggs*, 71 Ind. 255.

⁴ *Peck v. Peck*, 12 R. I. 485.

⁵ *Tarbell v. Tarbell*, 10 Allen, 278; *Falk v. Turner*, 101 Mass. 494; *Culbertson v. Culbertson*, 37 Ga. 296; *Naill v. Maurer*, 25 Md. 532; *Garrard v. Garrard*, 7 Bush, 486; *Pierce v. Pierce*, 71 N. Y. 154; *Daubenspeck v. Biggs*, 71 Ind. 255; *Jacobs v. Jacobs*, 42 Iowa, 160. The amount of property brought by the respective parties into the marriage may have a bearing on the issue whether the arrangement is grossly inequitable. *Peck v. Peck*, 12 R. I. 485; *Pierce v. Pierce*, *supra*. Such a provision usually contemplates passing over the surviving spouse in favor of surviving offspring; and this may some-

times suggest a restraint against construing such clauses in favor of surviving parents or collateral relatives of the deceased spouse.

⁶ *Charles v. Charles*, 8 Gratt. 486; *Hamrico v. Laird*, 10 Yerg. 222.

⁷ *Mintier v. Mintier*, 28 Ohio St. 307; *Hathaway v. Hathaway*, 46 Vt. 234; *Freeland v. Freeland*, 128 Mass. 509; *Boardman's Appeal*, 40 Conn. 169.

⁸ *Pond v. Skeen*, 2 Lea, 126. See also *Camp v. Smith*, 61 Ga. 449. A statutory specific allowance in case of a husband's decease, for the benefit of young children in a household as much as the widow, cannot on their part at all events, be affected by an antenuptial contract. *Phelps v. Phelps*, 72 Ill. 545. Cf. *Tierman v. Binns*, 92 Penn. St. 248.

In general, to preclude the usual marital rights of a spouse without some equivalent, plain intention should appear.¹

§ 364. **Covenant to settle After-acquired Property.**—Marriage settlements frequently contain a covenant on the husband's part to settle all the after-acquired property of the wife. Settlements of after-acquired or future property of either or both spouses are valid; and in most of the cases decided under this head, the courts have evidently sought to adapt the covenant to the presumed intention of the parties; the question still being one of intention to be gathered from the contents of the instrument by which the parties have bound themselves.² And the rule of construction is the same, whether damages for breach of covenant be sought at law, or specific performance in equity.³ Such covenants may be on the wife's part; or they may be conditional.⁴

The presumption is, however, that only property acquired during the marriage state is to be thus embraced under the terms of the settlement; and hence property acquired by the survivor of the marriage, after its dissolution, is not subjected to the trust in absence of explicit proof.⁵

§ 365. **Covenant against Bankruptcy, &c.**—Property cannot be settled by the intended husband, so that, in event of his future bankruptcy or insolvency, the wife will be entitled to a provision.⁶ But the wife's fortune may be settled on her husband till he fail, and then to her separate use.⁷

¹ *Pond v. Skeen*, 2 Lea, 126; *Mitchell v. Gates*, 23 Ala. 438.

² *Ramsden v. Smith*, 2 Drew. 302; *Steinberger v. Potter*, 3 C. E. Green, 452; *Withers v. Weaver*, 10 Barr, 391; *Vason v. Bell*, 58 Ga. 416.

³ *Smith v. Osborne*, 6 Ho. Lords, 394; *Blythe v. Granville*, 13 Sim. 190; *Tawney v. Ward*, 1 Beav. 563; *Young v. Smith*, L. R. 1 Eq. 180; *Peachey Mar. Settl.* 523; *Macq. Hus. & Wife*, 268. As to the application of this covenant to separate property, see *Mainwaring's Settlements*, L. R. 1 Eq. 180; *Milford v. Peile*, 17 Beav. 602; *Dering v. Kynaston*, L. R. 6 Eq. 212; *Campbell v. Bainbridge*, L. R. 6 Eq. 269; *Re Viant's Trusts*, L. R. 18 Eq. 436; *Dawes v. Tredwell*, 44 L. T. 740. That

a contingent remainder becoming vested during the coverture, or reversionary interest, may be included, see *Agar v. George*, 2 Ch. D. 706; *Re Mitchell's Trusts*, L. R. 9 Ch. D. 5; *Cornwell v. Keith*, 4 Ch. D. 767; *Re Jones's Will*, 2 Ch. D. 362.

⁴ *Peachey Mar. Settl.* 548.

⁵ *Re Campbell's Policies*, 6 Ch. D. 686; *Re Edwards*, L. R. 9 Ch. 97.

⁶ *Higginson v. Kelly*, 1 Ball & B. 255; *Peachey Mar. Settl.* 219; *In re Casey's Trusts*, 4 Ir. Ch. n. s. 247.

⁷ *Lester v. Garland*, 5 Sim. 223; *Sharp v. Cosserat*, 20 Beav. 470; *Lockyer v. Savage*, 2 Stra. 947; *Ex parte Verner*, 1 Ball & B. 260. And see *Higginson v. Kelly*, 1 Ball & B. 252.

§ 366. **Settlement where Debtor and Creditor Marry, &c.** — We have seen that when parties, having some debt to be paid or obligation to be performed, by the one in favor of the other, unite in marriage, the effect at common law is to discharge that debt or engagement.¹ But though such contracts be released in law, modern equity which enforces marriage settlements and preserves the wife's separate estate, relying upon the marriage consideration, will still hold the indebted or obliged party bound to performance in numerous instances; its policy being to give a more flexible scope to the presumed intention of the married parties.²

§ 367. **Remedies upon Breach of Marriage Covenant.** — There is this difference pointed out between promises and agreements in consideration of marriage, and all other agreements; namely, that the contract, though broken by one of the parties, remains binding upon the other. The reason for this is, that such promises and agreements affect not only the rights of the married pair, but those of their offspring; the children being, in fact, regarded as purchasers.³ But where the performance is sought by the defaulting party, the contract cannot be enforced against the person injured through such default;⁴ though performance by one party is not necessarily a condition precedent to a right to sue the other.⁵ The difference thus mentioned is, therefore, a difference which grows out of the peculiar nature of the contract, and the existence of parties, other than those contracting, who may be brought within the purview of the consideration. As Lord Eldon observes, the issue have a right to say to the parents, "You shall, each of you, do what you can do, and we must not be disappointed."⁶ Unquestionably, however, even in the case

¹ *Supra*, § 182; *Abbott v. Winchester*, 105 Mass. 115.

² *Power v. Lester*, 23 N. Y. 527; *Fitzgerald v. Fitzgerald*, L. R. 2 P. C. 83. This rule was enforced in *Miller v. Goodwin*, 8 Gray, 542, so as to require specific performance of a man's written contract to convey land to the woman, marriage entering into the consideration. And as to obtaining goods under a promise to marry not fulfilled, see *Frazer v. Boss*, 66 Ind. 1.

³ *Bale v. Coleman*, 1 P. Wms. 145; *Harvey v. Ashley*, 3 Atk. 610. Even children of a former marriage may enforce. *Gale v. Gale*, 6 Ch. D. 144.

⁴ *Crofton v. Ormsby*, 2 Sch. & Lef. 583.

⁵ See *Jeston v. Key*, L. R. 6 Ch. 610, as to covenant between husband and wife's father, under marriage articles agreeing to make a settlement which neither party performed.

⁶ *Randcliffe v. Parkyns*, 6 Dow, 209.

of a marriage settlement, the covenants may be so framed as to be mutually dependent; and if it be clear on the face of the settlement that such was the intention, that intention must prevail, even against the offspring of the marriage.¹

§ 368. **How Wife's Rights may be Forfeited.**—In an early case, Lord Talbot is reported to have said that where marriage articles were pretty much in the nature of a jointure, they were not forfeitable by adultery or an elopement.² And upon the strength of this, it has been held that marriage articles will be enforced on behalf of the wife, although she be living in a state of adultery.³ We find no late authority to support this doctrine, and it is doubtful whether such a rule would be enforced at this day.⁴

The wife may, like all others, forfeit her rights to a trust for her benefit, by long acquiescence as well as active participation in the unlawful acts of the trustees under the marriage settlement.⁵

§ 369. **Settlements less Common in United States than England; Registry and Other Statutory Provisions.**—Marriage settlements are very common in England, among parties possessed of large means; not generally so in this country, although many are made in the Southern States and elsewhere. The American policy is to dispense with trusts, and place a married woman's separate property in her own absolute keeping. Yet marriage settlements might often be well resorted to in order to equalize the burdens and privileges of matrimony, while our local legislation remains in its present crude condition. If settlements of property are made to the wife's separate use, the usual equitable rules apply, as to making the property liable for her debts and engagements.⁶

Our local registry system raises questions of constructive notice, as to marriage settlements and the property embraced

¹ Per Lord Cottenham, *Lloyd v. Lloyd*, 2 Myl. & Cr. 192; *Pyke v. Pyke*, 12 Ves. 67. See further, *Bliss v. Sheldon*, 7 Barb. 152; *Shoch v. Shoch*, 19 Penn. St. 252.

² *Sidney v. Sidney*, 3 P. Wms. 275; *Seagrave v. Seagrave*, 13 Ves. 443.

³ *Macq. Hus. & Wife*, 263; *Buchanan v. Buchanan*, 1 Ball & B. 206.

⁴ See *Peachey Mar. Settl.* 384; *Le-gard v. Hodges*, 4 Bro. C. C. 421, cited by Lord Manners in *Buchanan v. Buchanan*, 1 Ball & B. 206.

⁵ *Jones v. Higgins*, L. R. 2 Eq. 533; *Stone v. Stone*, L. R. 5 Ch. 74.

⁶ See *supra*, Part V.; *Sprague v. Shields*, 61 Ala. 423.

under them, often of great local importance, which do not appear to prevail in England, where the recording of deeds, though long ago commended by Blackstone,¹ is still strangely neglected by legislators.² The acknowledgment of such contracts, too, is in some States a prerequisite to their validity.³

A marriage contract made by a husband without fraud, and duly recorded, is a good settlement against him, and for valuable consideration, and the lien thus created on property therewith transferred and duly recorded is constructive notice to all subsequent creditors as to such property.⁴ But as to property to be subsequently acquired, even though the contract provides in terms for embracing such property under the trust, the record operates no such positive notice against the public.⁵ And in general, however good the settlement may be against the settlor and creditors, or even subsequent purchasers, legal liens actually acquired already *in rem*, as that of a judgment or mortgage prior to due record, cannot be divested.⁶

¹ 2 Bl. Com. 342, 343.

² Compare *Ingham v. White*, 4 Allen, 412, with *Teasdale v. Braithwaite*, 5 Ch. D. 630, in which James, L. J., declares it a hardship that in England there is no general registry of deeds, and that one who has conveyed to one owner may represent himself as owner and induce another the next day to accept a conveyance of the same property. And see *Gibbes v. Cobb*, 7 Rich. Eq. 54; *Logan v. Phillips*, 18 Mis. 22; *Levinz v. Will*, 1 Dall. 430; *O'Neill v. Cole*, 4 Md. 107; 1 Story Eq. Juris. § 403; 2 Kent Com. 173, n.; *Reinhart v. Miller*, 22 Ga. 402; *Clark v. Way*, 38 Ga. (Suppl.) 149; *Hill v. Garman*, 2 Del. Ch. 278. In Massachusetts an antenuptial contract is absolutely void under the statute, if not recorded as therein required, in the county in which the husband, if a resident, re-

sides. *Ingham v. White*, 4 Allen, 412. Otherwise as to a mere arrangement as to reciprocal rights after death and dissolution of the marriage. *Jenkins v. Holt*, 109 Mass. 261.

³ A marriage contract executed before marriage, but not acknowledged until after marriage, is a nullity. *Patton's Estate*, *Myrick's Prob.* (Cal.) 241. As to New York statutes on the subject, see *Douglas v. Cruger*, 80 N. Y. 15.

In Louisiana an antenuptial contract may provide that certain separate property of each party shall form part of the community. *Hanley v. Drumm*, 31 La. Ann. 106; *supra*, Part VI.

⁴ *Vason v. Bell*, 53 Ga. 416.

⁵ *Ib.*

⁶ *Ib.* See, further, *Justis v. English*, 30 Gratt. 565.

CHAPTER III.

POSTNUPTIAL SETTLEMENTS AND GIFTS; AS TO CREDITORS, &c.

§ 370. **Postnuptial Settlements distinguished from Antenuptial** — The important distinction between settlements before and settlements after marriage is that, while the former have the marriage consideration to support them, the latter are without it.¹ The term “postnuptial settlements,” then, must not confuse the reader’s mind. We use the language of the text-writers without meaning to imply that it is appropriate, or that antenuptial and postnuptial settlements constitute two branches of one general subject. On the contrary, postnuptial settlements are usually nothing more nor less than gifts of real or personal property, or of both, between husband and wife, which equity places, notwithstanding the disabilities of coverture, upon the footing of other gifts.²

Furthermore, it should be remembered that formal settlements made between parties in the marriage state, in pursuance of articles or memoranda signed before marriage, are not technically postnuptial settlements (as the name itself would seem to indicate); for the settlement relates back to the antenuptial stipulations, however loosely these may have been drawn up, and it is protected by the marriage consideration like all other antenuptial contracts.

§ 371. **Binding upon Parties; otherwise, as to Creditors, &c.** — But though, for want of consideration, postnuptial settlements are deemed voluntary, yet, like other voluntary transactions, they will be valid and binding, so far as the parties are concerned, and can only be impeached as fraudulent upon others. Postnuptial settlements, therefore, must be viewed in two

¹ *Supra*, § 347; *Lannoy v. Duke of Athol*, 2 Atk. 448.

concerns personal property, but we use the word here in its wider sense. ²

² “Gift” in the more technical sense

Schoul. Pers. Prop. 55.

different aspects; (1) as between the married parties and the creditor or purchasers of either; (2) as between husband and wife themselves. To the first aspect the present chapter will be devoted; and to the second the next chapter.

§ 372. **English Doctrine as to Creditors and Purchasers; Statutes 13 & 27 Eliz.** — There are two English statutes which control this subject, as concerns creditors and purchasers, to a great extent, wherever the husband makes a postnuptial settlement upon his wife and offspring. The first is that of 13 Eliz. c. 5, in favor of creditors; the second that of 27 Eliz. c. 4, in favor of purchasers; the one being directed against fraudulent conveyances of all property with intent to defeat or delay creditors; the other against fraudulent or voluntary conveyances of lands designed to defeat subsequent purchasers. These statutes, Lord Mansfield said, cannot receive too liberal a construction or be too much extended in suppression of fraud.¹ The bankrupt acts are material to consider in the former connection.

§ 373. **Effect of 13 Eliz. as to Creditors; English Rule.** — As to the first of these statutes, it is held that, if a man who is indebted conveys property for the use of his wife and children, or in trust for their benefit, such a conveyance is subject to the statute prohibition, inasmuch as the consideration, although good between the parties themselves, is not *bona fide* as regards creditors.² But a voluntary deed is good as against subsequent creditors; and there can be nothing inequitable in a man's making a voluntary conveyance to a wife, child, or even a stranger, if it be not at the time prejudicial to the rights of third persons, or in furtherance of some design of future fraud or injury to them.³ The question of fraudulent intent is the real point at issue. And as to fraud upon future creditors, it has been said that while an instrument might be executed with the purpose of defrauding them, it is not a thing very likely to happen.⁴ But cases of this sort are not impossible. Thus a person might make a

¹ Cadogan v. Kennett, Cowp. 484; Peachey Mar. Settl. 189.

² Goldsmith v. Russell, 5 De G. M. & G. 547; Peachey Mar. Settl. 191.

³ Holloway v. Millard, 1 Madd. 414; Peachey Mar. Settl. 192.

⁴ Jenkyn v. Vaughan, 25 L. J. Eq. 839.

voluntary settlement upon his wife and children, raising enough cash to pay off existing creditors, and leaving those who advanced the cash without the means of securing their reimbursement.¹ Doubtless such a transaction is to be set aside as fraudulent.²

The question of the husband's indebtedness, as affecting his postnuptial settlement, is not, however, as free from difficulty as it might appear at first sight. Concerning creditors existing at the time of the settlement, the settlement may be void under the statute; but not because the husband has creditors; for who goes through life without being indebted at all? It will be void, however, when he is so far indebted, and his debts are so considerable in amount, as to render him likely to be insolvent. Probabilities are sufficient to meet this case; and if existing creditors wish to set the conveyance aside, they need only show that at the date of the instrument he was indebted to such an extent that, having regard to his property, the effect might be to delay, hinder, and defraud them.³ The question is not that of actual insolvency, but the intention to defraud.⁴ But though the existence of debts then does not necessarily determine the validity of the settlement, it lays the foundation for inquiry, and is always material to the issue.

The property which may be recovered by creditors does not embrace property which is exempt from execution; for the creditors have no concern with anything except assets, actual or possible, for the payment of their debts.⁵ This was formerly a matter of dispute; but it is now apparently set at rest.

¹ *Richardson v. Smallwood*, Jac. 552; *Holmes v. Penney*, 3 Kay & Johns. 102.

² *Ib.*; *Macq. Hus. & Wife*, 275; *Peachey Mar. Settl.* 198.

³ *Jenkyn v. Vaughan*, 8 Drew. 424; *Turpley v. Hooper*, 2 Jur. n. s. 1081.

⁴ *Peachey Mar. Settl.* 196, and cases cited; *Skarf v. Soulby*, 1 M. & Gord. 375; *French v. French*, 6 De G. M. & G. 95; *Wakefield v. Gibbon*, 28 L. J. Eq. 508. As to the right of subsequent creditors to impeach a voluntary set-

tlement, see *Walker v. Burrowes*, 1 Atk. 98; *Richardson v. Smallwood*, Jac. 552; *Macq. Hus. & Wife*, 275; *Peachey Mar. Settl.* 197. When the deed is once set aside, the property is thrown open to all creditors. *Ede v. Knowles*, 2 Y. & Col. C. C. 178; *Kidney v. Cousmaker*, 12 Ves. 186; *Jenkyn v. Vaughan*, 8 Drew. 419.

⁵ *Peachey Mar. Settl.* 199 *et seq.*; 1 Story Eq. Juris. § 410. See 2 Kent Com. 443, n., 12th ed.

§ 374. *Effect of 13 Eliz. as to Creditors; American Rule.*—The statute of 13 Eliz. c. 5, is generally recognized throughout the United States; in some cases having been formally re-enacted; in others, claimed to be part of the common law transported hither by the first settlers; and hence gifts of goods and chattels, as well as voluntary conveyances of lands, by writing or otherwise, are void when made with intent to delay, hinder, and defraud creditors, even though the gift or conveyance be to wife and children.¹ For it is a maxim, both at the civil and common law, that the claims of justice shall precede those of affection.² And in general the rule appears to be co-extensive with the fraud in this country as in England.

But it must be admitted the principle is not stated with equal precision in all the States, and while some cases doubtless proceed upon the doctrine that the voluntary gift fails because there is an intent to hinder and defraud, others again seem to rest upon the mere existence of actual creditors whose rights are thereby impaired or prejudiced. It is not within our province to treat of this subject in its general bearings, as in gifts between man and man; but so far as the American decisions concern gifts between husband and wife, we shall presently give the results somewhat at length.³ The point of the distinction, however, is readily perceived to be this: that, whereas one class of cases tends to establish that the husband may never settle property upon his wife during coverture, if he owes debts at the time so as to be insolvent, but may otherwise do so absolutely without the fear of future creditors before his eyes; the other class of cases is to the purport that, no matter whether they be existing or subsequent creditors, his voluntary settlement upon his wife will be voidable if with intent to prejudice their rights, and not

¹ 2 Kent Com. 440, 441, and cases cited; *Bayard v. Hoffman*, 4 Johns. Ch. 450; *Montgomery v. Tilley*, 1 B. Monr. 157; *Reade v. Livingston*, 8 Johns. Ch. 481; *Pinney v. Fellows*, 15 Vt. 525; *Simpson v. Graves*, Riley Ch. 232; *Sexton v. Wheaton*, 8 Wheat. 229; 1 Am. Lead. Cas. 1.

² Cicero, de Off. I. 14, cited in 2 Kent Com. 441.

³ See 2 Kent Com. 440 *et seq.*; 4 *ib.* 463 *et seq.*, where the subject is discussed at length, with citations from American cases; *post*, § 377, note, with American citations as to creditors and purchasers.

otherwise. The latter we conceive to be the true rule, subject to the qualification that fraud as to existing creditors may be presumed from the fact of insolvency or even embarrassment.¹ According to the modern current of American authorities, mere indebtedness at the time of a settlement is only presumptive proof of fraud, which may be explained or rebutted; and it must also be shown that the husband was insolvent, or that the settlement directly tended to impair the rights of creditors.²

The language of the statutes in some States contributes to the confusion which prevails as to the correct legal doctrine on this whole subject. Furthermore, our registry system places the law on a somewhat different footing from that prevalent in England, in all settlements, as we noticed in the preceding chapter.³

§ 375. *Effect of Bankrupt Acts.* — Voluntary settlements, in England, are likewise affected by the bankrupt acts, which are intimately connected with the statute of Elizabeth.⁴ Here questions arise as to what acts amount to a contemplation of bankruptcy; and what constitutes a fraudulent preference; and these we need not here discuss. But it should be observed that the husband cannot bestow his property upon his wife, conditional upon his future bankruptcy or insolvency; yet, that third persons may, by voluntary conveyance, settle property to the wife's separate use, free from all control of her husband; or in trust to pay the income to the husband for life, "or until he should become a bankrupt," and after that, to the wife's separate use.⁵ In the former case the transaction would be simply an artifice of the husband to evade the bankrupt laws; in the latter, a third person parts with his own property, and makes his own terms as to its final disposition, as he has a right to do.⁶

¹ *Patrick v. Patrick*, 77 Ill. 555; *Lloyd v. Fulton*, 91 U. S. Supr. 479.

² *Post*, § 377.

³ *Supra*, § 369.

⁴ *Peachey Mar. Settl.* 210 *et seq.*

⁵ *Manning v. Chambers*, 1 De G. & Sm. 282; *Sharp v. Cossarat*, 20 Beav. 478.

⁶ See *supra*, § 365, as to antenuptial provisions of this character. The set-

tlement by a trader of all his property, both present and future, in trust for his wife's separate use, with remainder for himself for life, and remainder for his children, reserving the control of the stock in trade to himself, is likewise void as to creditors in bankruptcy. *Ware v. Gardner*, L. R. 7 Eq. 317. See also *Re Pearson*, 3 Ch. D. 807.

Our national bankruptcy system, as lately existing, also affected the doctrine of fraudulent conveyances in the United States. And under this act, the gift of all a debtor's property to his wife, if not more subtle contrivances for evading creditors as well, has been treated as constituting an act of bankruptcy.¹ With the Bankrupt Act repealed, this whole subject becomes regulated by State insolvent laws, which are far from uniform in their scope and purpose. As to artifices by a husband for keeping his own property under his own control, subject to its divestment in his wife's favor upon his bankruptcy, the American rule, like the English, dis-countenances them.²

§ 376. *Effect of 27 Eliz. as to defrauding Purchasers; English Doctrine.*—Settlements as concerns the right of creditors and purchasers are also affected by the statute of 27 Eliz. c. 4. This statute, too, is to be considered as part of the common law brought to this country by our ancestors; though not generally adopted here to the full extent of the English equity decisions.³ It provides that all conveyances of lands, made with the intent to defraud and deceive purchasers, shall, as against them, be utterly void. The statute has no application whatever to personal estate.⁴

The English doctrine is that a voluntary conveyance, though for a meritorious purpose, shall be deemed to have been made with fraudulent views, and must be set aside in favor of a subsequent purchaser for a valuable consideration, even though he had notice of the prior deed.⁵ In other words, while the statute of 13 Eliz. permits a voluntary conveyance to stand as against subsequent creditors, that of 27 Eliz. makes a voluntary conveyance of land void as against a subsequent purchaser for value. The principle on which the English cases rest appears to be that, by selling the property over again for a valuable consideration, the vendor so entirely repudiates the former transaction and shows his in-

¹ *Re Alexander*, 1 Lowell, 470. And see *Re Jones*, 6 Bias. 68.

² *Levering v. Heighe*, 2 Md. Ch. 81; *Head v. Halford*, 5 Rich. Eq. 128; *Peigne v. Snowden*, 1 Desaus. 591.

³ 4 Kent Com. 463.

⁴ *Sugden Vend. & Purch.* 587, 13th ed.; *Peachey Mar. Settl.* 226; 4 Kent Com. 463.

⁵ *Doe v. Manning*, 9 East, 59.

tention to sell, that the presumption against the prior gift becomes conclusive.¹ And while the correctness of this principle might well be doubted in its application to subsequent purchasers with notice, yet, as Lord Thurlow said, so many estates stand upon the rule, that it cannot be now shaken.² This doctrine applies to postnuptial settlements in England.³

§ 377. *American Doctrine as to defrauding Purchasers, &c.*—Fortunately in this country we have been hampered by no such severe construction of this statute. And in a case before the Supreme Court of the United States it was held that the principle of construction which prevailed in England, at the commencement of the American Revolution, went no further than to hold the subsequent sale to be presumptive and not conclusive evidence of a fraudulent intent in making the prior voluntary conveyance; and the court declined to follow the subsequently established construction of Westminster Hall.⁴ And the better American doctrine seems to be that voluntary conveyances of land, *bona fide* made, and not originally fraudulent, are valid as against subsequent purchasers having record or other notice.⁵

In some States, the English statute is re-enacted with the language essentially changed; as in Connecticut and New York. And it is the settled American doctrine that a *bona fide* purchaser for value is protected, whether he purchases from a fraudulent grantor or a fraudulent grantee; and that there is no difference in this respect between a deed to defraud subsequent creditors, and one to defraud subsequent purchasers; both being voidable only and not absolutely void.⁶ As to negotiable instruments not overdue, too, the

¹ Doe v. Risham, 17 Q. B. 724; 16 Jur. 359.

² Evelyn v. Templar, 2 Bro. C. C. 148; Peachey Mar. Settl. 228, and cases cited.

³ See Bill v. Cureton, 2 Myl. & K. 510; Peachey Mar. Settl. 232, 240. And English conveyancers insert words importing certain valuable considerations in such deeds, in order to deter purchasers.

⁴ Cathcart v. Robinson, 5 Pet. 280.

⁵ 4 Kent Com. 464, n., and cases

cited; Jackson v. Town, 4 Cow. 608; Ricker v. Ham, 14 Mass. 139; Atkinson v. Phillips, 1 Md. Ch. 507; Shepard v. Pratt, 32 Iowa, 296; Beal v. Warren, 2 Gray, 447. But *contra*, see Clanton v. Burges, 2 Dev. Ch. 18.

⁶ 4 Kent Com. 464, and cases cited in notes; Anderson v. Roberts, 18 Johns. 515; Bean v. Smith, 2 Mason, 262; Eldred v. Drake, 43 Iowa, 569; Oriental Bank v. Haskins, 3 Met. 332. So the English Stat. 3 & 4 Will. IV. c. 27, § 28, protects *bona fide* purchasers for value.

usual equity rule may apply, which protects in general the rights of a *bona fide* holder for consideration and without notice of adverse claim or fraudulent intent.¹

¹ *Farmers' Bank v. Brooke*, 40 Md. 249.

The following American cases may be cited with reference to the effect of a husband's postnuptial settlement as against his creditors, &c. See *supra*, § 374. In several States it is expressly held, that a voluntary transfer or conveyance from husband to wife is valid against all subsequent creditors and purchasers. *United States Bank v. Ennis*, Wright, 606; *Beach v. White*, Walk. Ch. 495; *Davis v. Herrick*, 37 Me. 397; *Story v. Marshall*, 24 Tex. 305; *Phillips v. Meyers*, 82 Ill. 67. A postnuptial settlement is not invalid, it is recently declared by the Supreme Court of the United States, if rights of existing creditors be not impaired. *Clark v. Killian*, 103 U. S. Supr. 786; *Jones v. Clifton*, 101 U. S. Supr. 225. In New Jersey, however, the rule, as concisely stated, is that the husband's settlement, if voluntary, is fraudulent as to existing debts by an inference of law; and, as to subsequent debts, fraud in fact must be proved. *Annin v. Annin*, 24 N. J. Eq. 184; *Belford v. Crane*, 1 C. E. Green, 285. This is the doctrine in New York and many other States, and indeed a preferable one, though the tendency is to regard intent. *Reade v. Livingston*, 3 Johns. Ch. 481; *supra*, § 374; *Lyman v. Cessford*, 15 Iowa, 229. And Chancellor Kent has ruled, in the leading American case on this subject, that if a settlement after marriage be set aside by the prior creditors, subsequent creditors are entitled to come in and be paid out of the proceeds of the settled estate. *Reade v. Livingston*, 3 Johns. Ch. 481. That intended fraud, and this alone, should be considered, as to a husband's subsequent creditors, in case of his voluntary settlement for his wife and children, see *Mattingly v. Nye*, 8 Wall. 370; *Caswell v. Hill*, 47 N. H. 407; *Phillips v. Wooster*, 36 N. Y. 412;

Place v. Rhem, 7 Bush, 585; *Niller v. Johnson*, 27 Md. 6; *Teller v. Bishop*, 8 Minn. 226. The husband's condition as to his creditors is to be regarded with reference to the time he made the settlement upon his wife, not with reference to the condition subsequently of his estate upon his death. *Leavitt v. Leavitt*, 47 N. H. 329. Concerning the unfavorable effect of a secret agreement between husband and wife upon the rights of intervening creditors, ignorant of such agreement, see *Hatch v. Gray*, 21 Iowa, 29; *Annin v. Annin*, 24 N. J. Eq. 184; *Phelps v. Morrison*, *ib.* 195. A husband's voluntary conveyance may, from its very substance, be void as to all creditors, being an artifice to keep his property out of his creditors' hands in case of future insolvency while using it in trade. *Case v. Phelps*, 39 N. Y. 164; *supra*, § 374. Equity will regard, in cases of this sort, the intent, notwithstanding a compliance with certain formalities of transfer on the husband's part. *Metropolitan Bank v. Durant*, 22 N. J. Eq. 85. That as to existing creditors, the husband's intent to defraud should be considered, which intent may be inferred from his insolvency or embarrassment, see the late cases of *Redfield v. Buck*, 35 Conn. 328; *Gardner v. Baker*, 25 Iowa, 343; *Woolston's Appeal*, 51 Penn. St. 452; *Bertrand v. Elder*, 23 Ark. 494; *Lloyd v. Fulton*, 91 U. S. Supr. 479; *Myers v. King*, 42 Md. 65.

The right of a husband to settle the surplus of property, over and above what he then owes, for the benefit and future comfort of wife and children, is liberally considered in *Gridley v. Watson*, 58 Ill. 186; *Vance v. Smith*, 2 Heisk. 343; *Brookbank v. Kennard*, 41 Ind. 339; *White v. Bettis*, 9 Heisk. 645. But even here it is proper that abundant means for creditors should be reserved, nor should such a settlement be with a view of incurring debts

§ 378. **Whether a Child prejudiced by a Settlement may attack it.**—Postnuptial settlements for the welfare of minor children, together with the wife, are favored in numerous instances, like antenuptial.¹ It is sometimes held that a postnuptial settlement will not be enforced in equity to the prejudice of the rights of children for whom no provision has been made;² though in such a case it would appear that the complainant must show that he is thus prejudiced.³

§ 379. **Effect of Wife's Innocence; Claims of Husband's Creditors.**—The fraudulent effect of a mere gift by husband to wife, which consists in placing the property beyond the reach of his creditors, is not averted by the fact that the wife did not know the gift was improper, so long as she knew he was indebted.⁴ Nor, in general, does it appear that her knowledge is of consequence, since the settlor's intent is here the material point to consider. But, of course, where there

in the future. *Allen v. Walt*, 9 Heisk. 242.

For instances where a husband's voluntary conveyance to his wife has been set aside as in fraud of creditors, see *Clarke v. McGeighan*, 25 N. J. Eq. 428; *Watson v. Riskamire*, 45 Iowa, 281; *Annin v. Annin*, 24 N. J. Eq. 184. See further, *Davidson v. Lanier*, 51 Ala. 318; *Bowser v. Bowser*, 82 Penn. St. 57; *Nippes's Appeal*, 75 Penn. St. 472.

"Fraud," observes Mr. Justice Swayne in a recent case, "is always a question of fact with reference to the intention of the grantor. Where there is no fraud, there is no infirmity in the deed. Every case depends upon its circumstances and is to be carefully scrutinized. But the vital question is always the good faith of the transaction. There is no other test." *Lloyd v. Fulton*, 91 U. S. Supr. 479. In this case it was held that the husband's prior indebtedness, apart from insolvency, &c., was only presumptive and not conclusive proof of fraud, and that the presumption was open to explanation. And see *Patrick v. Patrick*, 77 Ill. 555; *Booker v. Worrill*, 55 Ga. 832; *Kaufman v. Whitney*, 50 Miss. 108.

Yet transfers to the wife of an insolvent debtor, and even purchases by her, are justly regarded with suspicion; and consideration from her separate estate must be established by affirmative proof. *Seitz v. Mitchell*, 94 U. S. Supr. 680; *Kehr v. Smith*, 20 Wall. 31.

The husband's possession of his wife's property is not a badge of fraud. *Barnard v. Kuhn*, 36 Penn. St. 383. Nor are his representations of ownership, as it would appear, sufficient to charge such property for his debts, unless deceitful and calculated to mislead the public. *Lyman v. Cessford*, 15 Iowa, 229. See *supra*, §§ 248, 277-285, *passim*.

¹ See *White v. Bettis*, 9 Heisk. 645; *Goff v. Rogers*, 71 Ind. 459; *supra*, §§ 348, 349.

² *Crooks v. Crooks*, 34 Ohio St. 610.

³ *Ibid.*; *Majors v. Everton*, 89 Ill. 56. A grown child, not dependent for support, is not greatly favored. *Horden v. Horden*, 23 Kan. 891.

⁴ *Matson v. Melchor*, 42 Mich. 477. Cf. as to antenuptial settlement upon a wife, who knew her husband to be embarrassed, but did not know he was insolvent, *supra*, *Prewitt v. Wilson*, 108 U. S. Supr. 22, § 349.

is consideration for the settlement claimed on her part, so that her position is that of *bona fide* purchaser, so to speak, her innocence or complicity in the fraud becomes a material issue.¹

Even accumulations by labor and the natural produce of the fund may be reached by creditors, where the original fund was transferred to his wife in fraud of their rights by an insolvent husband, and by way of voluntary gift to her.²

§ 380. **Valuable Consideration sustains against Creditors, &c.** — There are instances in which a postnuptial settlement has been sustained against creditors and purchasers on the ground that a valuable consideration is interposed. Thus, Lord Hardwicke has said, "If, after marriage, the father of the wife, or other person, in consideration of the husband making a settlement, advance a sum of money, such a settlement will be good and for a valuable consideration. And though the money be not paid at the time, yet if it be sufficiently secured, the settlement will stand."³ Very slight or technical considerations are often held sufficient to support a gift to the wife in English chancery.⁴ So voluntary settlements may become valid by matter *ex post facto*.⁵

In this country, as also in England, a voluntary settlement by husband upon the wife may become valid by matter subsequently arising.⁶ The rule is general that where any marriage settlement is for a valuable consideration, it cannot be avoided as fraudulent upon the creditors, unless both husband and wife were cognizant of the fraud; her position here being the usual one of *bona fide* purchaser for value.⁷ And in nu-

¹ *Supra*, § 370; *post*, § 380.

² *Hamilton v. Lightner*, 53 Iowa, 470. But intent to defraud in conveying a farm does not necessarily impair the wife's rights to crops raised thereon. *Sanders v. Chandler*, 26 Minn. 273.

³ *Wheeler v. Caryl*, Amb. 121. See further, *Macq. Hus. & Wife*, 277; *Cottle v. Tripp*, 2 Vern. 220; *Ward v. Shallet*, 2 Ves. Sen. 17; *Lavender v. Blackstone*, 2 Lev. 147; *Arundell v. Phipps*, 10 Ves. 140.

⁴ *Peachey Mar. Settl.* 233, 238;

Butterfield v. Heath, 15 Beav. 414; *Fitzmaurice v. Sadlier*, 9 Ir. Ch. 595; *Hewison v. Negus*, 16 Beav. 594; *Bayspoole v. Collins*, L. R. 6 Ch. 228; *Re Foster*, 6 Ch. D. 87; *Teasdale v. Braithwaite*, L. R. 5 Ch. D. 630; *Ex parte Fox*, L. R. 1 Ch. D. 302.

⁵ *Peachey Mar. Settl.* 236; *Prodgere v. Langham*, 1 Sid. 138; *Brown v. Carter*, 5 Ves. 877.

⁶ 4 Kent Com. 463; *Sterry v. Arden*, 1 Johns. Ch. 261; *Huston v. Cantrell*, 11 Leigh, 136.

⁷ *Magniac v. Thompson*, 7 Pet. 348;

merous instances, the equity courts of various States have sustained a postnuptial gift or transaction in the wife's favor and against the husband's creditors, on the ground that a valuable consideration was interposed.¹

4 Kent Com. 468. The connection between prior and subsequent, so as to sustain the consideration, should be shown. *Cheatham v. Hess*, 2 Tenn. Ch. 768.

¹ As where the husband has transferred property to his wife in consideration of payment from her separate estate. *Simmons v. McElwain*, 28 Barb. 420; *Bullard v. Briggs*, 7 Pick. 533; *Ready v. Bragg*, 1 Head, 511. And see *Teller v. Bishop*, 8 Minn. 226; *Butterfield v. Stanton*, 44 Miss. 15; *Randall v. Lunt*, 51 Me. 246; *Reich v. Reich*, 26 Minn. 97; *Mix v. Andes Ins. Co.* 16 N. Y. Supr. 897. And where he conveys what her equity entitles her to claim. *Poindexter v. Jeffries*, 15 Gratt. 863. And where he has appropriated a like amount of his wife's property without her consent. *Wiley v. Gray*, 36 Miss. 510. So where the wife pays her husband's debts from her separate earnings. *Dygert v. Remerschneider*, 39 Barb. 417. Or releases her dower or homestead. *Unger v. Price*, 9 Md. 552; *Randall v. Randall*, 37 Mich. 563; *Randles v. Randles*, 68 Ind. 93; *Nalle v. Lively*, 15 Fla. 130; *Payne v. Hutcheson*, 32 Gratt. 812; *Garlick v. Strong*, 3 Paige, 440; *Hale v. Plummer*, 6 Ind. 121; *Andrews v. Andrews*, 28 Ala. 432. Or, in general, releases her interest in his property. *Davis v. Davis*, 25 Gratt. 587. Or advances money to the husband to buy land, even though it be conditioned upon paying and securing the money to her children. *Goff v. Rogers*, 71 Ind. 459. Or where the husband is indebted to her for rents collected from her separate real estate. *Barker v. Morrill*, 55 Ga. 332; *Kaufman v. Whitney*, 50 Miss. 103. Or upon any debt due her. *French v. Motley*, 63 Me. 326; *Brigham v. Fawcett*, 42 Mich. 542; *Lahr's Appeal*, 90 Penn. St. 507. Or a claim, generally, which grows out of the husband's appropriation of his wife's separate estate, if

founded on an agreement to refund. *Odend'hal v. Devlin*, 48 Md. 439. See also *Johnston v. Gill*, 27 Gratt. 587; *Thompson v. Feagin*, 60 Ga. 83; *Bedell's Appeal*, 87 Penn. St. 510. But not a claim for the husband's mere appropriation, without any such agreement to refund. *Clark v. Rosenkrans*, 81 N. J. Eq. 665. See also *Rose v. Brown*, 11 W. Va. 122.

Priority considered of a mortgage given by husband and wife in trust for the wife, to secure to her money loaned by her from her separate estate. *McFarland v. Gilchrist*, 25 N. J. Eq. 487. In States which permit a preference of creditors the husband is permitted to prefer his wife, if she be his creditor. *Jordan v. White*, 38 Mich. 253. And see *Wood v. Warden*, 20 Ohio, 518. Some of the later decisions speak of a "reasonable provision" made for the wife by the husband while in prosperous circumstances. *Babcock v. Eckler*, 24 N. Y. 628; *Townsend v. Maynard*, 45 Penn. St. 193. And the wife's relinquishment of her equity to a *chose in action* constitutes a valuable consideration, even perhaps for his settlement of the whole *chose* upon her. *Bradford v. Goldsborough*, 15 Ala. 311; *Barron v. Barron*, 24 Vt. 875. But where the consideration advanced by the wife is inadequate, equity will never sustain the settlement further than to secure the repayment thereof, and not always even to this extent; especially if she be privy, with her husband, to a fraud upon others. *Herschfeldt v. George*, 6 Mich. 456; *Skillman v. Skillman*, 2 Beas. 403; *Farmers' Bank v. Long*, 7 Bush, 387; *Den v. York*, 18 Ired. 206; *Pusey v. Harper*, 27 Penn. St. 409; 2 Kent Com. 174; *William & Mary College v. Powell*, 12 Gratt. 372; and see § 296, *supra*. And a settlement of all or the greater part of the husband's property upon his wife, on the plea of a reasonable provision for her support, is

§ 381. **Valuable Consideration to Wife; Subject continued.** — The wife's complicity in a fraud upon antecedent creditors may impair her own claims.¹ But even though the transaction were not fully sustained as to pre-existing creditors, the inclination is to protect her to the extent of her own consideration, and place her *in statu quo* as far as possible.² Mere suspicions arising from the relation of husband and wife will not disturb a settlement upon her as for value received.³ Appropriation of the wife's property, as though in assertion of a husband's marital rights, is, however, a suspicious circumstance, no agreement to refund having passed;⁴ and so is a sale by husband to wife without delivery;⁵ or a provision out of all reasonable proportion to the alleged consideration.⁶ That which belongs to the husband by common-law right, unaffected by equity or statute, unless he chooses to bestow it upon the wife, cannot constitute a consideration on her part for his further transfer of property to her.⁷ The primary issues, in short, in all such cases, are whether the indebtedness of husband to wife, or the consideration passing from the latter, was *bona fide*, and whether there was fraud or no fraud intended in the transaction; and these issues are usually for a jury to determine.

§ 382. **Statutory Requirements; Registry, &c.** — Statutory requirements, such as registry or acknowledgment, are found to affect postnuptial transactions in local practice.⁸

not sustainable in equity. *Coates v. Gerlach*, 44 Penn. St. 48. A settlement by a husband on his wife, in consideration of her services, is voluntary merely, apart from statutes which change the common law. *Belford v. Crane*, 1 C. E. Green, 265. And see *Keith v. Woombell*, 8 Pick. 211.

¹ *Annin v. Annin*, 24 N. J. Eq. 184; *Phelps v. Morrison*, *ib.* 195.

² *Hinkle v. Wilson*, 53 Md. 287; *Davis v. Davis*, 25 Gratt. 587.

³ *French v. Motley*, 63 Me. 326. The fact that the debt from husband to wife which formed the consideration was barred by limitations, is not conclusive against the wife's rights. *Ib.*

⁴ *Clark v. Rosenkrans*, 81 N. J. Eq. 665.

⁵ *Lewis v. Caperton*, 8 Gratt. 148; *Geisendorff v. Eagles*, 70 Ind. 418; *Woodruff v. Apgar*, 42 N. J. L. 198.

⁶ *Coates v. Gerlach*, 44 Penn. St. 48. Cf. *Thompson v. Feagin*, 60 Ga. 82.

⁷ As, *e. g.*, her earnings or family plate. *Belford v. Crane*, 1 C. E. Green, 265. And see *Terry v. Wilson*, 68 Mo.

⁸ As where a pecuniary provision is made the wife in lieu of dower. *Randles v. Randles*, 68 Ind. 93. And see *Brookbank v. Kennard*, 41 Ind. 339.

A man's transaction with a woman may be so carried out that, as against creditors, part may be sustained as antenuptial, and part fail as postnuptial and voluntary. *Zimmerman v. Heinrichs*, 43 Iowa, 200.

CHAPTER IV.

POSTNUPTIAL SETTLEMENTS AND GIFTS; AS BETWEEN THE SPOUSES.

§ 383. **Voluntary Conveyance or Gift Good against Grantor or Donor.** — The effect of a postnuptial settlement, as between the parties themselves, and independently of the rights of creditors and purchasers, claims our attention for the present chapter. Although a direct gift of property by the husband to the wife is void at law, it will be sustained in equity, so far as they are concerned and their heirs and personal representatives and assigns. In general, to constitute a voluntary gift between parties, it must be complete, or courts of equity will not enforce it; and not only must the intention to give clearly appear, but that intention must have been executed.¹ But the rule is more favorable as to a *cestui que trust* claiming against his trustee;² and it is thus perceived why on general principles the intervention of a trustee is preferable to support such a settlement. All voluntary conveyances, though void against creditors and purchasers for value, are good against the grantor and those claiming under him.³

§ 384. **Effect of Mere Promise or Assignment; Declaration of Trust.** — A voluntary promise does not constitute a perfect gift. Nor is a voluntary assignment, unaccompanied by other acts more effectual to confer a title on the donee than a mere agreement, as it has been repeatedly held in equity.⁴ But there is some difficulty in reconciling the authorities on this latter subject; for it has been fully decided that the

¹ *Cotteen v. Missing*, 1 Madd. 176; *Manning*, 1 De G., M. & G. 192; *Beech Kekewich v. Manning*, 1 De G., M. & v. Keep, 18 Beav. 289. G. 188.

² *Bill v. Cureton*, 2 Myl. & K. 510;

³ *Ellison v. Ellison*, 6 Ves. 662; *Doe v. Rusham*, 17 Q. B. 724.

Peachey Mar. Settl. 245, 246; *Meek v.* ⁴ *Edwards v. Jones*, 1 M. & Cr. 226; *Kettlewell*, 1 Hare, 470; *Kekewich v. Holloway v. Headington*, 8 Sim. 324.

voluntary assignment without reservation of a *chose in action* or incorporeal personalty is good, if the relation of *cestui que trust* and trustees be once established; while, on the other hand, if one assigns to trustees certain property immediately transferable, the gift is imperfect without the transfer.¹ The point of the distinction seems to be, that in the one case the donor, by the assignment, not only indicates the intention of making a gift, but executes his intention so far as it is possible for him to do so, or so far, at least, that the donee might as a matter of justice, come into equity and get his title perfected; while, in the other, by his failure to make the transfer, he does not execute his intention to the extent of his power, but leaves it incomplete. Whatever may be the real principle involved, the authorities proceed on the ground that a trust relation is in the former case created by the instrument.

Hence, a mere formal assignment to a wife is incomplete as such; for a husband ought to do all he can to make the settlement or gift complete; as, for instance, to convey the land, transfer the stock, or indorse over the negotiable instruments payable to his order. Words importing a husband's present intention to make a gift cannot operate to complete it.² And his oral promise to make a gift is void for want of consideration.³ Nevertheless, in a strong emergency, the deed or writing of assignment may operate as a declaration of trust, rendering the husband himself, if need be, a trustee to carry it into full execution.⁴

§ 385. **Husband's Gift or Voluntary Conveyance to Wife Sustained.** — It has been repeatedly held, in chancery courts

¹ See *Bridge v. Bridge*, 16 Beav. D. 416; *Campbell's Appeal*, 80 Penn. 321; *Donaldson v. Donaldson*, Kay, 717; *St. 298*.

McFaddyn v. Jenkyns, 1 Hare, 462; *Peachey Mar. Settl.* 247, 248; *Scales v. Maude*, 6 De G. M. & G. 52; *Penfold v. Mould*, L. R. 4 Eq. 562. As to the assignment of leaseholds to a wife; the deed operating sufficiently as a declaration of trust, see *Fox v. Hawks*, L. R. 13 Ch. D. 822. And see *Thomas v. Harkness*, 13 Bush, 23. See, too, *supra*, § 157; also, as to gifts in general, 2 Sch. Pers. Prop. Part V. c. 2.

² *Breton v. Woollven*, L. R. 17 Ch.

³ *Lloyd v. Fulton*, 91 U. S. Supr. 479; *Bradley v. Saddler*, 54 Ga. 681.

⁴ *Baddeley v. Baddeley*, 26 W. R. 850. And see *Thomas v. Harkness*, 13 Bush, 23; *Hutchins v. Dixon*, 11 Md. 29. This doctrine of equity seems a dangerous one to press far, since it tends to dispense with the fundamental doctrine that a gift, to be irrevocable, ought to be perfected by delivery and acceptance. See *Wade v. Cantrell*, 1 Head, 349.

of this country, that gifts of personal property or voluntary conveyances of real estate from husband to wife are, as between themselves, valid, and such is now the rule in most, but not all, of the States; the married women's acts in some jurisdictions creating a legal estate in the wife under such circumstances. The evidence of intention should be clear and distinct in all such cases.¹ There should be a clear irrevocable gift to a trustee for the wife, or some positive act by the husband, by which he divests himself of the property, and engages to hold it for the wife's separate use.² As in other cases of gift *inter vivos*, there should be, in such transfers of personal property, delivery with suitable intent on the donor's part; delivery according to the subject-matter; delivery directly or through some third party, such as a trustee; delivery by acts parol, or under an instrument in writing, such as a deed of gift. Delivery should be according to the subject-matter; imperfect delivery being permitted by way of an equitable assignment in the case of incorporeal, but not of corporeal, personalty. The donee should accept correspondingly; though acceptance is preferable; and the mutual

¹ *Borst v. Spelman*, 4 Comst. 284; *Coates v. Gerlach*, 44 Penn. St. 43; *Jennings v. Davis*, 31 Conn. 134; *George v. Spencer*, 2 Md. Ch. 353; *Deming v. Williams*, 26 Conn. 226; *Reynolds v. Lansford*, 16 Tex. 286; *Pennsylvania, &c. Co. v. Neel*, 54 Penn. St. 9; *Hunt v. Johnson*, 44 N. Y. 27; *Sims v. Rickets*, 35 Ind. 181; *Kitchen v. Bedford*, 18 Wall. 413. *Campbell v. Galbreath*, 12 Bush, 459.

² But see *Towle v. Towle*, 114 Mass. 167. As to a gift *causa mortis*, see *post*, Part VIII.

It would appear to be the rule of some States, that the gifts of a husband require less proof than the gifts of third persons. *Deming v. Williams*, 26 Conn. 226. In some States, however, the wife is put upon strict proof as to all implied gifts. *Gannard v. Eslava*, 20 Ala. 733; *Paschall v. Hall*, 5 Jones Eq. 108; *Hollifield v. Wilkinson*, 54 Ala. 275. The precise extent to which the rule of a gift without a trustee will be enforced depends greatly upon

the liberality of the married women's legislation in any particular State,—a subject which has already been discussed. See *Underhill v. Morgan*, 33 Conn. 106; *Brown v. Brown*, 23 Barb. 566; *Jennings v. Davis*, 31 Conn. 134; *Wilder v. Aldrich*, 2 R. I. 518. A gift with power to the wife to dispose thereof by will may be good against the husband's representatives. *Churchill v. Corker*, 25 Geo. 479. But it is said that a man cannot denude himself of his marital rights in property which the law vests in him by simply declaring that it belongs to his wife. *Wade v. Cantrell*, 1 Head, 346.

A grown child not dependent on his father for support, though he be heir, cannot impeach the husband's voluntary conveyance or gift to the wife. *Horder v. Horder*, 23 Kan. 391; *supra*, § 378. It is good against the husband's heirs-at-law in general, and especially if a reasonable provision for the wife. *Majors v. Everton*, 89 Ill. 56; *Crooks v. Crooks*, 34 Ohio St. 610.

intention may be gathered from words, acts and mutual conduct.¹ And the gift once completed cannot be revoked or annulled without the mutual assent of donor and donee.²

§ 386. **Husband's Gift or Settlement; Instances.** — Thus the promissory note of a creditor or other third party may thus be legally transferred by the husband to his wife under some of the married women's acts;³ and independently of such statutes on equitable grounds.⁴ His voluntary settlement of choses or incorporeal personalty upon her is good, *prima facie*;⁵ and this may include an assignment of a claim due him.⁶ The husband may make a gift to his wife by depositing in some savings bank on his wife's separate account and by his acts binding the bank to account to her.⁷ Leasehold property may be assigned to the wife by way of gift.⁸ Where the husband gives corporeal property there should be some visible change of possession manifested; and in gifts, as of furniture, of that which remains in the common dwelling-house, there may be difficulty in establishing a transfer.⁹ The wife may be the grantor, under due statutory formalities, of real estate from her husband,¹⁰ or of real and personal property combined.¹¹ Rents and profits may be secured to her exclusive beneficial use.¹² But to prove the executed gift, so

¹ For the principles applicable to such gifts, see 2 Sch. Pers. Prop. Part V. c. 2.

² *Ib.* c. 3.

³ *Motley v. Sawyer*, 38 Me. 68; *Dillage v. Parks*, 81 Barb. 132; *Slawson v. Loring*, 5 Allen, 340. And see *Clough v. Russell*, 55 N. H. 279. But cf. *Hoker v. Boggs*, 63 Ill. 161.

⁴ *Tullis v. Fridley*, 9 Minn. 79.

⁵ *Campbell v. Galbreath*, 12 Bush, 459. Such transfer is frequently good without formal assignment. *Seymour v. Fellows*, 44 N. Y. Super. 124.

⁶ *Seymour v. Fellows*, 77 N. Y. 178.

⁷ *Fisk v. Cushman*, 6 Cush. 20; *Howard v. Windham Co. Savings Bank*, 40 Vt. 597; *Sweeney v. Five Cents' Savings Bank*, 116 Mass. 384; *Spelman v. Aldrich*, 126 Mass. 113. *Aliter*, where the deposit is not in con-

travention of a husband's marital rights and control. See *McCubbin v. Patterson*, 16 Md. 179; *Way v. Peek*, 47 Conn. 23.

⁸ *Fox v. Hawks*, L. R. 13 Ch. D. 822.

⁹ *Re Pierce*, 7 Biss. 426.

¹⁰ *Thompson v. Commissioners*, 79 N. Y. 54; *McMillan v. Peacock*, 57 Ala. 127; *Sherman v. Hogland*, 54 Ind. 578. See *post*, as to conveying through trustee, or directly from one spouse to another. A false recital in the deed cannot make the conveyance antenuptial or "in consideration of marriage." *Phillips v. Phillips*, 9 Bush, 183.

¹¹ *Wing v. Goodman*, 75 Ill. 159; *Indianapolis R. v. McLaughlin*, 77 Ill. 275.

¹² *Hutchinson v. Mitchell*, 39 Tex. 487.

as to establish a *bona fide* transfer against the husband's creditors, involves, of course, the greater difficulty.¹

§ 387. **Wife's Rights as against Strangers; her Dominion as Donee, &c.** — One sued in respect of the property transferred to the wife, or an intruder, and third persons generally, utter strangers to the transaction, ought not, as a rule, to dispute collaterally the wife's title as grantee or transferee from her husband under the conveyance or assignment.²

A voluntary conveyance by the husband to his wife in consideration of natural love and affection creates usually an equitable separate estate; and, whether equitable or legal, she may encumber or alienate or transfer it, as in other instances of property held to her separate use.³

§ 388. **Husband's Transfer, not intending a Gift.** — But the circumstances under which the husband's transfer is made are always material. Thus a husband might have placed his earnings or property in his wife's hands for safe-keeping, and not as a gift to her, in which case title to the fund should be respected accordingly as between them; or it might be regarded, perhaps, as bestowed for their joint benefit or that of the whole family upon due proof.⁴ Or the understanding might be that the transaction was to stand upon mutual consideration or by way of security.⁵

§ 389. **Husband's Transfer as a Conditional Gift, &c.** — The husband's gift or settlement may be qualified instead of absolute. But his reservation of a power to revoke or appoint to other uses does not impair the validity or efficiency of the

¹ *Supra*, § 381; *Re Pierce*, 7 Biss. 426.

² *Thompson v. Commissioners*, 79 N. Y. 54; *Seymour v. Fellows*, 77 N. Y. 178; *Hollifield v. Wilkinson*, 54 Ala. 275; *Degman v. Farr*, 126 Mass. 297. But see *Hoker v. Boggs*, 68 Ill. 161; *Chicago v. McGraw*, 75 Ill. 566; *Huftalin v. Misner*, 70 Ill. 55.

A wife has been allowed, under a postnuptial settlement, to subject her property to her husband's debts. *Muller v. Bayly*, 21 Gratt. 521. For the general rules as to dominion over her separate property, see Part V., *supra*.

³ *McMillan v. Peacock*, 57 Ala. 127; *Myers v. James*, 2 Lea, 159.

⁴ *Marshall v. Crutwell*, L. R. 20 Eq. 328; *Adlard v. Adlard*, 65 Ill. 213; *Edgerly v. Edgerly*, 112 Mass. 175; *Seibold v. Christian*, 7 Mo. App. 254.

⁵ *Grain v. Shipman*, 45 Conn. 572. Where the evidence is conflicting as to a husband's object in making conveyance to his wife, the ordinary presumption of a provision for her benefit is not rebutted. *Linker v. Linker*, 33 N. J. Eq. 174.

transfer to his wife to hold until this power shall be executed; nor does it raise any imputation of bad faith in the transaction.¹

§ 390. **Gift or Voluntary Conveyance from Wife to Husband.**—While instances of gifts or voluntary conveyances from husband to wife are most commonly considered, gifts from wife to husband are by no means rare. But in the latter instance fraud or undue influence may be reasonably suspected; and transactions of this sort are scrutinized by the courts with great care.² Before the wife's separate use was established in chancery, little or no occasion could arise for the wife to bestow her personal property upon her husband, for the law sufficiently bestowed it without her aid.

The gift or voluntary conveyance once deliberately and absolutely made cannot usually be recalled by the settlor or donor upon allegations which fail to establish material fraud or coercion in the inducement, or a mutual material mistake, or upon any subsequent change of circumstances, such as death or divorce. This is the usual rule, and it applies to a husband's gifts to his wife.³ But the wife's gift to her husband appears to be more leniently regarded in this respect than that of a husband to his wife; her readier liability to imposition or a misapprehension of legal rights being admitted, in courts of equity, in her favor.⁴

¹ *Jones v. Clifton*, 101 U. S. Supr. 225. Such a power does not, in the event of the husband's bankruptcy, pass to his assignee. *Ib.*

² *Cruger v. Douglas*, 4 Edw. Ch. 483; *Nedby v. Nedby*, 11 E. L. & Eq. 106; *Re Jones*, 6 Biss. 68; *Converse v. Converse*, 9 Rich. Eq. 535; *Stiles v. Stiles*, 14 Mich. 72; *Hollis v. François*, 5 Tex. 195; *Wales v. Newbould*, 9 Mich. 45; *Merriam v. Harsen*, 4 Edw. Ch. 70. As to gifts and loans of the wife's separate property to her husband, including mortgages, see also *supra*, Part V.; *post*, § 396.

³ *Jagers v. Jagers*, 49 Ind. 428; *Chew v. Chew*, 38 Iowa, 405. If the husband made the gift, knowing that his wife had another husband, he cannot, after divorce, have the gift set

aside. *Chew v. Chew*, 38 Iowa, 405. And see as to wife's alleged misconduct, *Kehr v. Smith*, 20 Wall. 81.

⁴ *Boyd v. De La Montagnie*, 73 N. Y. 498; *Smyley v. Reese*, 53 Ala. 89; *Campbell's Appeal*, 80 Penn. St. 298. A provision more beneficial to a husband than is reasonable may be set up as an abuse of his confidential relation to his wife. *McRae v. Battle*, 69 N. C. 98; *Witbeck v. Witbeck*, 25 Mich. 439. See also *Birdsong v. Birdsong*, 2 Head, 289; *Wells v. Wells*, 35 Miss. 638; *M'Clellan v. Kennedy*, 8 Md. Ch. 234.

Gifts and voluntary transfers by the husband to third persons, if not with the actual intent of defeating the wife's rights, are held in Maryland to be sustainable, though leaving her without the means of subsistence; but here the

§ 891. *Postnuptial Settlement or Transfer upon Consideration.* — If husband and wife may transfer property to one another without consideration, still more may they do so where the consideration is valuable. All such provisions, even if made without the intervention of a trustee, though void in law (independently of suitable married women's acts), may be enforced in equity if fairly made between the parties, and with no fraudulent intent upon others concerned,¹ a rule which, with particular force, sustains an indebted husband's provision in his wife's favor, wholly or partially executed. The mutual contracts of the spouses for a transfer, where there is a *bona fide* and valuable consideration, may be specifically enforced in equity upon proof that the agreement has been executed by one party, and not by the other. Thus a husband and wife agreed, by parol, that he should purchase a lot of land in her name, and build a house thereon, and be reimbursed from the proceeds of the sale of another house belonging to her. The husband having executed the agreement on his part, the wife died suddenly, before the sale of her former house could be effected. She left infant children. It was decreed in equity that the agreement should be carried into effect, the former house sold, a conveyance thereof executed by the infants, by their guardian *ad litem*, and the husband be reimbursed out of the proceeds of the sale.²

statutes of Elizabeth would apply. *Feigley v. Feigley*, 7 Md. 537.

¹ See *supra*, § 880. And see *Crouse v. Morse*, 49 Iowa, 382.

The husband's note or bond to pay money in consideration that his wife would live with him is not on good consideration. *Roberts v. Frisby*, 38 Tex. 219; *Ximines v. Smith*, 39 Tex. 49. Cf. *Kehr v. Smith*, 20 Wall. 81. Nor prior advances to the wife disconnected with the settlement, and made without expectation of repayment. *Perkins v. Perkins*, 1 Tenn. Ch. 537. But where the wife advances money to her husband as his creditor, or the latter is indebted to her upon any valid consideration, a fair conveyance or transfer may be made to adjust or secure such liability. *Keener v. Trigg*, 98 U. S.

Supr. 50; *Clough v. Russell*, 55 N. H. 279; *Sims v. Rickets*, 35 Ind. 181; *Booker v. Worrill*, 55 Ga. 382; *Kaufman v. Whitney*, 50 Miss. 103; *Greer v. Greer*, 24 Kans. 101; *Rowland v. Plummer*, 50 Ala. 182; *Barclay v. Plant*, 50 Ala. 509; *Jordan v. White*, 38 Mich. 253; *Lehman v. Levy*, 30 La. Ann. 745. Releases of dower in husband's lands may furnish consideration. *Supra*, § 380; *Sykes v. Chadwick*, 18 Wall. 141 (a statute case).

As to transfers out of all proportion to the consideration, and apparently fraudulent, see *Kelley v. Case*, 18 Hun, 472; *Warren v. Ranney*, 50 Vt. 653.

² *Livingston v. Livingston*, 2 Johns. Ch. 537. And see *Bowie v. Stonestreet*, 6 Ind. 418; *Jones v. Jones*, 18 Md. 464; *Standman v. Wilbur*, 7 R. I. 481; *Peiffer*

But the mere fact that the husband has received property in right of the wife cannot constitute a valuable consideration by relation, to support a settlement upon her some years afterwards; and this, on the general principle applicable to contracts.¹ Nor can an antenuptial settlement, once extinguished by the agreement of all parties concerned, be revived for such purpose.² In no case should contracts in derogation of the husband's property rights rest upon slight proof; the relation of debtor and creditor should be distinctly shown.³

§ 392. *Trustees in Postnuptial Settlements, &c.* — The common-law requirement that trustees shall intervene in conveyances or transfers between husband and wife no longer prevails to any great extent, in England or the United States, as a doctrine of equity.⁴ But trustees are always desirable; and in some States it is a rule that the husband and wife can only contract with one another through the intervention of third persons.⁵ This passes a legal estate in any event, and permits of suits relative to the property with more freedom; for it should still be remembered that suits at law between husband and wife are discountenanced at the common law; and their gifts and contracts generally. The insolvency of a trustee does not impair the validity of such a transfer to him on a wife's behalf.⁶

§ 393. *Construction of Postnuptial Settlements; Errors rectified; Presumed Advancement.* — In the construction of a postnuptial settlement, made in due form, questions of interpretation may of course arise, such as are common to all marriage settlements; ⁷ and the rectification of mistakes may likewise be invoked in a court of chancery.⁸

The usual presumption of chancery is that the postnuptial conveyance of land, or transfer of money to the wife by way

v. Lytle, 58 Penn. St. 386. Cf. O'Hara v. Dilworth, 72 Penn. St. 397.

¹ Lyne v. Bank of Kentucky, 5 J. J. Marsh. 545.

² Harper v. Scott, 12 Ga. 125.

³ See Steadman v. Wilber, 7 R. I. 481; Tripner v. Abrahams, 47 Penn. St. 220; Wales v. Newbould, 9 Mich. 45.

⁴ Jones v. Clifton, 101 U. S. Supr. 225; Baddeley v. Baddeley, 28 W. R.

850; Thomas v. Harkness, 18 Bush, 23.

⁵ McMullen v. McMullen, 10 Iowa, 412; Johnston v. Johnston, 1 Grant, 468; Pike v. Baker, 58 Ill. 168.

⁶ Rowland v. Plummer, 50 Ala. 182.

⁷ Re Mackenzie, L. R. 6 Eq. 210. And see *supra*, c. 2.

⁸ Hanley v. Pearson, L. R. 13 Ch. D. 545; *supra*, c. 2.

of gift, is intended as an advancement for her benefit; and where the name of a third person is also used, that person becomes presumably her trustee.¹ But such presumptions may be repelled upon due proof.²

CHAPTER V.

GENERAL TRANSACTIONS BETWEEN HUSBAND AND WIFE.

§ 394. **General Contracts between Husband and Wife.**—In general, wherever a contract is just and reasonable of itself, and would be good at law when made with trustees for the wife, that contract will be sustained in equity, when made between husband and wife without the intervention of trustees,³ notwithstanding that at common law spouses could not make mutual contracts. A mutual agreement, by which the wife renounces all further claim upon the husband for his services, or necessary support for herself, and stipulates that she will contract no debts on his account, while the husband renounces all claim for her services or support, affords a strong illustration. This might not avail against creditors, but so far as the husband and his heirs, and in fact all who claim under him, are concerned, it will be enforced.⁴

But as to a wife, her contract prejudicial to her interests is still so unfavorably regarded, that a statute must be explicit in order to bind her as to her executory contracts or general engagements with her husband. The married women's acts, as yet, seldom permit of a wife's executory contracts with any one outside her separate estate or separate

¹ *Re Eykyn's Trusts*, L. R. 6 Ch. D. 43; *Wright v. Wright*, 16 Iowa, 496; 115.

² *Darrier v. Darrier*, 58 Mo. 222.

³ *Wallingsford v. Allen*, 10 Pet. 583; *2 Story Eq. Juris*, § 1204; *Slanning v. Style*, 8 P. Wms. 384; *Barron v. Barron*, 24 Vt. 375; *Resor v. Resor*, 9 Ind. 347; *Coates v. Gerlach*, 44 Penn. St. 43; *Williams v. Maull*, 20 Ala. 721; *Schaffer v. Reuter*, 37 Barb. 44; *Hutton v. Duey*, 8 Barr, 100; *Sims v. Rickets*, 35 Ind. 181; *McC Campbell v. McC Campbell*, 2 Lea, 661; *Myers v. King*, 42 Md. 65.

⁴ *Barron v. Barron*, 24 Vt. 375.

trade.¹ But whatever the law will compel parties to do, they may do voluntarily; and this is a principle applicable to transactions as between husband and wife, so far as equity may exercise jurisdiction in the case.²

§ 395. *The Husband as Borrower from his Wife.*—Where a husband, instead of asserting his marital rights to his wife's personal property as at common law, or being precluded from asserting such rights under the statute, actually borrows money or property from her with the understanding that it shall be repaid, he will be treated in equity as her debtor accordingly;³ and married women's acts are found to treat such a loan as constituting a valid indebtedness legally enforceable against him or his estate on her behalf as a creditor.⁴

Whether gift or loan be the effect of such a transaction is now a question of intention, to be determined by the proof submitted.⁵ But formerly it would have been said that at law, and upon the coverture theory, the husband's promise to refund money to the wife as a borrower had neither parties nor a consideration.⁶

§ 396. *Promissory Note from One Spouse to the Other.*—A wife is not legally liable, in the absence of an enabling statute,

¹ *Bassett v. Bassett*, 112 Mass. 99; *Hogan v. Hogan*, 89 Ill. 427; *Jenne v. Marble*, 37 Mich. 319. And see *supra*, pt. 5, cc. 3-5, as to her dealings with third persons. Some statutes are explicit enough for such purposes. *Hamilton v. Hamilton*, 89 Ill. 349. And see *Hon v. Hon*, 70 Ind. 185; *Elfelt v. Hinch*, 5 Oreg. 255; *Grove v. Jeager*, 60 Ill. 249.

Judgment confessed by a husband in his wife's favor is now held good in some States. *Rose v. Latschaw*, 90 Penn. St. 288.

As to transactions where a member of an indebted partnership is husband of the creditor, see *Osborn v. Osborn*, 38 Mich. 48; *Moore v. Foote*, 34 Mich. 443.

Oral evidence may be introduced in equity to show that what purported to be a written agreement between husband and wife was intended mutually to have no binding force. *Earle v. Rice*,

111 Mass. 17. *Wood v. Warden*, 20 Ohio, 518, treats a paper acknowledging the receipt of money paid by the wife, and making collateral stipulations, as a postnuptial settlement enforceable against his estate, after his death, to the exclusion of his other creditors.

² See *Campbell v. Galbreath*, 12 Bush, 459; *Randall v. Randall*, 37 Mich. 563.

³ *Jaycox v. Caldwell*, 51 N. Y. 395.

⁴ *Whitford v. Daggett*, 84 Ill. 144. *Monroe v. May*, 9 Kan. 466; *Woodworth v. Sweet*, 51 N. Y. 8; *supra*, Part V.

⁵ See *supra*, § 388. The indorsement of a draft given in settlement of the wife's legacy, and its deposit to the husband's bank account, is insufficient proof of a gift to him, for this might be for mere convenience of collection. *Green v. Carlill*, 4 Ch. D. 282.

⁶ *Johnston v. Johnston*, 81 Penn. St. 450; *Frierson v. Frierson*, 21 Ala. 549; *supra*, Part IV.

upon a promissory note made by her, payable to her husband's own order, and by him indorsed over.¹ And the husband's note, given to his wife and transferred by her, is equally void.² But in some States, where a note is made by a wife payable to her husband, it may be enforced by a third party who holds it, on the usual principles applicable to her separate property and separate liabilities.³ Under recent acts, a note from husband to wife or from wife to husband, if for sufficient consideration, has been held enforceable in some States.⁴ And equity will sometimes enforce such an instrument, with respect to the parties themselves, as a declaration of trust.⁵

§ 397. **Conveyance from One Spouse to Another; Lease, &c.** — A conveyance, by husband and wife, of land belonging to the wife, to a third person, and a conveyance of the same land by such third person to the husband, vests the entire title in the husband.⁶ But a conveyance of lands by the wife directly to her husband, especially if it be voluntary, has been considered ineffectual and void. And even under the late married women's acts, her right to make such a conveyance is still generally, though not universally, denied,⁷ and she must convey through a third person, her husband joining in her own conveyance.

So it is the older rule that the husband cannot convey real estate to his wife directly, and without the intervention of a trustee.⁸ But the husband may make a valid conveyance to his wife through the medium of a third person,⁹ or, under

¹ *Roby v. Phelon*, 118 Mass. 541.

² *Hoker v. Boggs*, 68 Ill. 161.

³ *Morrison v. Thistle*, 67 Mo. 593. Proof that the wife transferred as the husband's agent might establish a right of action upon the husband's note to her. *Hoker v. Boggs*, 63 Ill. 161.

⁴ *Greer v. Greer*, 24 Kan. 101.

⁵ *McC Campbell v. McC Campbell*, 2 Lea, 661.

⁶ *Supra*, § 269; *Merriam v. Harsen*, 4 Edw. Ch. 70; *Durant v. Ritchie*, 4 Mason, 45; *Garvin v. Ingram*, 10 Rich. Eq. 130; *Bowen v. Seabree*, 2 Bush, 112. This is a good conveyance, even though the third person be an adult son. *Chicago v. McGraw*, 75 Ill. 566.

⁷ *White v. Wager*, 32 Barb. 250; *Winans v. Peebles*, 32 N. Y. 423; *Gebb v. Rose*, 40 Md. 387; *Preston v. Fryer*, 38 Md. 221; *Fowler v. Trebein*, 16 Ohio St. 493. But see *Robertson v. Robertson*, 25 Iowa, 350.

⁸ *Voorhees v. Presbyterian Church*, 17 Barb. 103; *Ransom v. Ransom*, 30 Mich. 328.

⁹ A judgment lien against the third party is not effectual against the wife. *O'Donnell v. Kerr*, 50 How. (N. Y.) Pr. § 324. And see *Huftalin v. Mianer*, 70 Ill. 55. Destruction of unrecorded deeds will not invalidate the wife's title as against the grantor and his heir. *Dukes v. Spangler*, 85 Ohio St. 119.

some of the latest statutes, directly to her; and the deed (supposing it to have been properly recorded) will be good against all but injured creditors.¹

The reason of this rule was the legal unity of husband and wife at the common law;² while the statute of uses furnished a mode of conveyance through trustees.³ While it does not appear that a deed by husband to wife is of itself valid and operative in equity more than law, special circumstances might induce a court of equity to give effect to it where a court of law could not; as by decreeing the husband a trustee for his wife; not, however, without strict scrutiny where rights of creditors are infringed, nor in any case where the equity is not made apparent.⁴

Under some statutes the wife may lease directly to her husband,⁵ and the husband, perhaps, to the wife; and here, too, the medium of a trustee may be invoked by way of assignment. Practical difficulties may arise, however, in suing upon the covenants as between husband and wife directly, so contrary are all such transactions to the old rule of coverture.⁶

§ 398. **Conveyance of Lands to Husband and Wife.** — It may here be added that, at the common law, a conveyance of land to husband and wife and their heirs vests the entirety in each of them; and upon the death of one the survivor takes the whole estate, discharged of the other's debts.⁷ They do

¹ *Jewell v. Porter*, 11 Fost. 84; *ler v. Trebein*, 16 Ohio St. 493; *Ransom v. Ransom*, 30 Mich. 328; *Wells v. Caywood*, 8 Col. 487; *supra*, § 269.

² 1 Washb. Real Prop. 279.

³ 1 Roper Hus. & Wife, 53; *Thatcher v. Omans*, 3 Pick. 521; 1 Washb. Real Prop. 279; *Wms. Real Prop.* 185. The later American cases are disposed to sustain all such conveyances, when with valuable consideration, upon equitable grounds. *Winans v. Peebles*, 82 N. Y. 423; *Putnam v. Bicknell*, 18 Wis. 383; 2 Story Eq. Juris. § 1204; *Wallingsford v. Allen*, 10 Pet. 583. In various States the trustee or intermediate grantee is now dispensed with altogether under statutes treating the wife as *sui juris*. *Allen v. Hooper*, 50 Me. 371. And see *Albin v. Lord*, 39 N. H. 196; *Fow-*

ler v. Trebein, 16 Ohio St. 493; *Ransom v. Ransom*, 30 Mich. 328; *Wells v. Caywood*, 8 Col. 487; *supra*, § 269.

⁴ *Loomis v. Brush*, 86 Mich. 40; *Dale v. Lincoln*, 62 Ill. 22; *Aultman v. Obermeyer*, 6 Neb. 260.

⁵ *Albin v. Lord*, 39 N. H. 196; *America Bank v. Banks*, 101 U. S. Supr. 240.

⁶ *Jeune v. Marble*, 37 Mich. 319; *supra*, § 271.

⁷ *Wright v. Sadler*, 20 N. Y. 320; *Banton v. Campbell*, 9 B. Monr. 587; *Gilson v. Zimmerman*, 12 Mis. 385; *Bates v. Seely*, 46 Penn. St. 248; *French v. Mehan*, 56 Penn. St. 286; *Robinson v. Eagle*, 29 Ark. 202; *Marburg v. Cole*, 49 Md. 402; *Fisher v. Provin*, 25 Mich. 847.

not take by moieties, nor can either alienate the property alone or charge for one's own sole debts so as to bind the other. The theoretic unity of husband and wife occasioned this rule. It applies only to conveyances made to them during coverture. In the same way a conveyance to husband and wife and a third person gives only a moiety to husband and wife;¹ and the conveyance being made to several persons, two of whom are husband and wife, these two take their portion as tenants by entirety likewise, whether the deed described them as husband and wife or not.² A judgment against a husband does not affect the joint estate of the husband and wife, and a decree in equity in favor of such a judgment creditor can confer no better title than a sale of the premises under the judgment at law.³ Nor can the wife maintain ejectment alone, or an action for use and occupation as to such premises,⁴ or charge it with her debts.⁵ A sheriff's sale fails to pass the undivided half of either, or indeed any title whatever.⁶

Where the wife has an estate for life, and husband and wife are seised of the remainder in entirety, the estate for life does not merge in the estate in remainder.⁷ Where, again, the conveyance is to her for life, with remainder to her husband, and, in case he does not survive her, to his heirs, the wife cannot claim the whole by right of survivorship.⁸ And if the equitable title to land is in the wife, it cannot, of course, be conveyed to husband and wife so as to bar her rights.⁹

¹ See 1 Washb. Real Prop. 278; Wms. Real Prop. 184.

² Hulett v. Iulon, 57 Ind. 412.

³ Thomas v. De Baum, 1 McCart. 87; Tupper v. Fuller, 7 Rich. Eq. 170; Davis v. Clark, 26 Ind. 424.

⁴ Allie v. Schmetz, 17 Wis. 169. And see Torrey v. Torrey, 4 Kern. 430; Clark v. Thompson, 12 Penn. St. 274; Wentworth v. Remick, 47 N. H. 226; Freeman v. Barber, 1 Hun, 433.

⁵ Baker v. Lamb, 18 N. Y. Supr. 519.

⁶ Almond v. Bonnell, 76 Ill. 536; Anderson v. Tannehill, 42 Ind. 141; McConnell v. Martin, 52 Ind. 434. Equity,

however, reserving the wife's potential survivorship and right to enjoy, will sometimes dispose of the husband's interest for the benefit of his creditors. Cochran v. Kerney, 9 Bush, 199.

⁷ Bomar v. Mullins, 4 Rich. Eq. 80. And see Brinton v. Hook, 3 Md. Ch. 477.

⁸ Riggin v. Love, 72 Ill. 553.

⁹ Moore v. Moore, 12 B. Monr. 651. And see Hicks v. Cochran, 4 Edw. Ch. 107; Barnard v. Kuhn, 36 Penn. St. 383; Wright v. Sadler, 20 N. Y. 320; Wales v. Coffin, 13 Allen, 218; 1 Washb. Real Prop. 278, and cases cited.

But if lands descend to A., B., and C., they each take a third part, though A. and B. happen to be husband and wife.¹ And it is said that by express words husband and wife may be made tenants in common by a gift to them during coverture.²

The estate of entirety may be conveyed in fee or encumbered by the joint deed of husband and wife.³ And in some States legislation has abrogated this common-law doctrine of entirety altogether.⁴ By the common law the beneficial enjoyment during the joint lives of husband and wife was that of the husband; but in this respect the married women's acts have made some changes.⁵

§ 399. **Promissory Note or Security Payable to Husband and Wife.** — Where a promissory note, too, or other evidence of a debt, or personal security, is made payable to a husband and wife jointly, it belongs to the survivor, and may be sued upon accordingly;⁶ but not if the facts are inconsistent with that presumption of joint-ownership which a technical expression of this sort would afford;⁷ and the drift of modern policy, we may add, is unfavorable to extending to personalty this rule of survivorship, applicable originally to real estate.⁸

§ 400. **General Effect of Gift, &c., to Husband and Wife; their Joint Investment.** — If a gift or settlement be made to husband and wife jointly, the husband (where permitted, as under the old rule, to reduce to possession) may collect the whole; but if not reduced to possession, the fund will survive to the wife. Where the fund is in chancery, however, a settlement may be ordered, or the fund reserved with a suitable decree

¹ *Knapp v. Windsor*, 6 Cush. 156.

² *Prest. Abst.* 41; 1 Washb. Real Prop. 278. See *Barnes v. Loyd*, 37 Ind. 523.

Under a devise to husband and wife, making them joint tenants, the husband's interest is vendible on execution against him, the purchaser, however, buying subject to the wife's right, in case she survives her husband, to take the entire estate. *Hall v. Stephens*, 65 Mo. 670.

³ *McDuff v. Beauchamp*, 50 Miss. 531. See *Insurance Co. v. Nelson*, 108 U. S. Supr. 544.

⁴ And thus may the spouses be regarded as joint tenants or rather tenants in common. *Cooper v. Cooper*, 76 Ill. 57; *Whittlesey v. Fuller*, 11 Conn. 337; *Clark v. Clark*, 56 N. H. 105; *Meeker v. Wright*, 76 N. Y. 262.

⁵ *Bolles v. State Trust Co.*, 27 N. J. Eq. 308; *Kip v. Kip*, 38 N. J. Eq. 218.

⁶ *Abshire v. State*, 53 Ind. 64, and cases cited.

⁷ *Sanford v. Sanford*, 45 N. Y. 723; *Johnson v. Lusk*, 6 Cold. 113.

⁸ *Wait v. Bovee*, 35 Mich. 425.

as to the disposal of the income ; and a husband's creditors may avail themselves accordingly.¹

A purchase or investment is sometimes made with the joint funds of husband and wife, or in such other manner as to make their interest joint or common.² Under such circumstances a wife may claim protection of her undivided interest against a seizure or attachment of the fund by the husband's creditors.³ But in equity a partition of such interests is favored,⁴ and the subjection of the husband's interest or share to the claims of his own creditors.⁵

In Massachusetts, a wife and her husband owning a vessel together are jointly liable on the contracts of the master made within due scope of authority ; and this, though the husband himself be master.⁶

Where real estate is purchased with joint funds of husband and wife, and the title conveyed to the latter without fraudulent complicity, the creditors of the husband must resort to equity in order to reach his equitable interest.⁷

§ 401. **Resulting Trust as to a Fund in Husband's or Wife's Favor.**—The question whether a resulting trust is established in certain property of husband or wife, comes up constantly in the latest American cases, with the extension of equity jurisdiction in the States and the new married women's legislation. Issues of this sort are made up not only where the claim is that

¹ 2 Perry Trusts, § 644 ; *supra*, § 160. Where the husband transfers a fund to the name of himself, his wife, and a third person, the presumable intent is to make that third person a trustee for the survivor ; though, had the third person contributed to the investment, the effect would be rather to create a joint or common tenancy in the fund. *Re Eykyn's Trusts*, L. R. 6 Ch. D. 115. As to a wife's corresponding transfer, cf. *Batstone v. Salter*, L. R. 10 Ch. 431.

² *Kilby v. Godwin*, 2 Del. Ch. 61.

³ In Iowa the wife need not resort to remedies by injunction, but may notify the officer of the existence of her claim. *McTighe v. Bringolf*, 42 Iowa, 455.

⁴ *Long v. Perdue*, 83 Penn. St. 214 ; *Bagge v. Bagge*, 54 Ga. 95.

⁵ *Creighton v. Clifford*, 6 Rich. 188.

⁶ *Reiman v. Hamilton*, 111 Mass. 245.

⁷ *Snow v. Paine*, 114 Mass. 520. The marital occupation of the wife's separate farm, as between her and her husband, is but one possession, and manure accumulated upon the land, though produced in part by his stock or hay, is part of the land belonging to her. *Norton v. Craig*, 68 Me. 275. But where husband and wife own premises jointly they may join in an action for injury thereto. *Armstrong v. Colby*, 47 Vt. 360, and cases cited.

of a wife against her husband, or of a husband against his wife, but in controversies between either one and the creditors of the other. The decision must be according to the evidence adduced, which is usually oral, deference being paid to the usual presumptions as between husband and wife; but the ostensible title afforded by instruments of title or security standing in the name of the one is thus overthrown by proof that the property actually belonged by right to the other.¹ As between themselves, therefore, one spouse may be treated as in effect trustee for the other, and bound to make the title according to the just ownership; though an intervening purchaser in good faith for value may be entitled to protection, of course, by reason of a superior equity,² as also may the general creditors in some instances.³ Even though the husband become embarrassed in circumstances, he may be compelled to execute his trust for the wife's benefit.⁴ But to the extent of the husband's own pecuniary interest in such a fund his creditors may claim the benefit, besides which the identity of the wife's property is of material importance.⁵

§ 402. *Purchasing Spouse's Property at Sheriff's Sale, &c.* — A creditor or third person may buy the debtor's property at a sheriff's or bankruptcy sale, and then give or sell it to the debtor's wife, provided, of course, the transaction be *bona fide*; for this would be his own gift or transfer, not the husband's, and the husband's own insolvency cannot invalidate the transaction.⁶ So, too, the wife's purchase of her husband's property at a sheriff's or bankruptcy sale, upon a *bona fide* bid, vests in her a good title as her separate property.⁷ A similar rule applies, in the absence of fraud, where she or

¹ Among late cases under this head, see *Sweeney v. Damron*, 47 Ill. 450; *Bent v. Bent*, 44 Vt. 555; *Cotton v. Wood*, 25 Iowa, 48; *Howe v. Colby*, 19 Wis. 583; *Cairns v. Colburn*, 104 Mass. 274; *Fribble v. Hall*, 18 Bush, 61; *Evans v. English*, 61 Ala. 416; *Carpenter v. Davis*, 72 Ill. 14; *Keller v. Keller*, 45 Md. 289; *Payne v. Twyman*, 68 Mo. 339; *Dula v. Young*, 70 N. C. 450; *Irvine v. Greever*, 32 Gratt. 411; *Davis v. Davis*, 48 Ind. 561; *Lyon v. Akin*, 78 N. C. 258. As to disputing a

deed by parol, notwithstanding the statute of frauds, in such an issue, see *Foot v. Bryant*, 47 N. Y. 544.

² *Dixon v. Brown*, 53 Ala. 428.

³ *Darnaby v. Darnaby*, 14 Bush, 485; *Brooks v. Shelton*, 54 Miss. 353.

⁴ *Payne v. Twyman*, 68 Mo. 339.

⁵ See *supra*, §§ 277-285; *Hearn v. Lander*, 11 Bush, 669; *Sampson v. Alexander*, 66 Me. 182.

⁶ *Winch v. James*, 68 Penn. St. 297.

⁷ *Bowser v. Bowser*, 82 Penn. St. 57; *Blum v. Harrison*, 50 Ala. 16.

some one in her interest purchases under a mortgage or judicial sale of premises belonging to her husband, no fraud being disclosed in the transaction.¹ But if fraud is committed on the wife in such a transaction, through the husband's false inducement, or by other means, she may obtain relief against the disadvantageous purchase and recover the money paid.²

§ 403. **Equitable Relief for Fraud, &c., of One upon the Other.**—Equity, in recognizing husband and wife as distinct persons capable of contracting with one another and holding property adverse to one another's claims, affords the relief appropriate to such a situation. Where either one is false to the other, and fraudulently or through coercion procures an unjust advantage, chancery will relieve against the transaction.³

A voluntary and self-imposed trust, without consideration, may likewise, it is held, be set aside by a court of equity when its purpose has been fulfilled and there is no reason for preserving it.⁴

§ 404. **Insurance on Husband's Life for Wife's Benefit.**—Insurance is frequently effected by a husband on his own life for the separate benefit of his wife; a provision most just and honorable, if not so unreasonable in amount, with its incidental payment of premiums, as to defraud one's antecedent creditors. The subsequent *bona fide* assignment by wife and husband of such a policy for the benefit of the latter's creditors, is sustained in several late cases;⁵ though an assignment procured from the wife, injurious to her interest, must raise the general question of a wife's separate contracts and

¹ *Page v. Dixon*, 59 Mo. 48; *Hill v. Bugg*, 53 Miss. 397.

² *Case v. Colter*, 66 Ind. 336. And see *Norman v. Norman*, 6 Bush, 495.

³ *Supra*, § 390, and cases cited; *Case v. Colter*, 66 Ind. 336. The wife's fraud on her husband was relieved against in *Stone v. Wood*, 85 Ill. 608.

⁴ *Tucker's Appeal*, 75 Penn. St. 354.

⁵ Whether the creditors of a married woman for premiums paid on a

policy upon her husband's life can enforce payment out of her separate estate, see *Ogden v. Guill*, 56 Miss. 330. As to the extent to which the validity of the wife's title to the policy-money may be affected in consequence, see *Barry v. Mut. Life Ins. Co.*, 49 How. (N. Y.) Pr. 504; *Godfrey v. Wilson*, 70 Ind. 50. Under some statutes, the wife's assignment with her husband's consent may suffice without his signature. *Whitridge v. Barry*, 42 Md. 140.

liability;¹ and an assignment procured from her by fraud or undue marital influence amounting to compulsion will not be enforced.² Due reference being had to the language of every policy, it is likewise true, in general, that if the husband survive the wife, for whose benefit the policy was taken out, he may dispose of it otherwise, and, with the insurer's consent, can have it changed so as even to benefit a subsequent wife, in case he marries again.³

The proceeds of a policy of insurance on her husband's life, when realized by the wife after his death, are not absolved from her own liabilities, although exempt from the payment of debts contracted by the husband during his lifetime.⁴ Her constituted agent for paying the premiums is liable to her (under her separate estate or statutory rights) for his default or misconduct.⁵ And chancery will sometimes intervene, where the face of the policy does not sufficiently indicate the interest intended for wife or children, and protect their interests against the husband and his creditors.⁶ A policy may be limited to children in default of the wife surviving; and, if so, the wife cannot assign it to their detriment.⁷

¹ *Supra*, Part V.

² *Whitridge v. Barry*, 42 Md. 140; *Fowle v. Butterly*, 78 N. Y. 68.

A policy in the wife's name, and for her benefit, upon her husband's life, becomes her separate property beyond his reach. *Southern Life Ins. Co. v. Booker*, 9 Heisk. 606; *Succession of Bofenschen*, 29 La. Ann. 711.

³ See *Pomeroy v. Manhattan, &c. Ins. Co.*, 40 Ill. 398; *Emerick v. Coakley*, 35 Md. 188; *Gamba v. Covenant*,

&c. Life Ins. Co., 60 Mis. 44; *Kerman v. Howard*, 23 Wis. 108; *Stokes v. Coffey*, 8 Bush, 533; *Thompson v. American, &c. Ins. Co.*, 46 N. Y. 674. And see 1 Schouler Pers. Prop. 708-727.

⁴ *Smedley v. Felt*, 48 Iowa, 607.

⁵ *Ainsworth v. Backus*, 5 Hun, 414.

⁶ *Re Mellor's Policy Trusts*, L. R.

6 Ch. D. 127.

⁷ *Knickerbocker Life Ins. Co. v. Weitz*, 99 Mass. 167.

PART VIII.

DISSOLUTION OF THE MARRIAGE RELATION BY DEATH

CHAPTER I.

SURVIVING HUSBAND'S GENERAL RIGHTS AND LIABILITIES.

§ 405. **Husband's Common-Law Right to Administer.**—On the death of the wife, the husband becomes entitled to administer on her estate. The court having jurisdiction in such matters must issue letters to him, and to him alone, unless he renounce or decline. The foundation of this claim has been variously stated; by some it is said to be derived from the statute 31 Edw. III., on the ground of the husband's being "the next and most lawful friend" of his wife; while there are other authorities which insist that the husband is entitled at common law, *jure mariti*, and independently of the statutes. But this right, however founded, is now regarded in England as unquestionable, and is expressly confirmed by the statute 29 Car. II. c. 3 (amendatory of statute 22 & 23 Car. II. c. 10), which enacts that the statute of distributions "shall not extend to the estates of *femes covert* that shall die intestate, but that *their husbands may demand and have administration* of their rights, credits, and other personal estates, and recover and enjoy the same as they might have done before the making of the said act."¹ This same right of the husband is generally, though not universally, recognized in this country, and in the different States there are statutes which

¹ 1 Wms. Ex'rs, 4th Am. ed., 336 *et seq.*

regulate the subject of administration, not only as to the wife dying intestate, but as to all others; and these statutes are usually found to recognize and confirm the husband's preferred right to administer upon his wife's estate.¹

To this rule some exceptions have been introduced, however, in later years, both in England and the United States, owing chiefly to the modern facilities for separation and divorce, and the enlarged capacity given to the wife to act as a *feme sole*, and to dispose of her own property. Thus, in a late English case, where a married woman lived separate from her husband, after having obtained an order of protection, and then died, leaving him and a minor son, administration was granted to a guardian elected by the son, upon proper security, without citing the father.² And in this country the marital rights of the husband over his wife's unadministered property, when her death occurred during a state of separation for his misconduct, have been sometimes denied.³

Since, as we have already seen, the husband takes absolutely his wife's personal *choses in possession* at the common law by virtue of the marriage, and, if he be the survivor, her chattels real likewise, there would generally appear to be no object gained in seeking letters of administration on her estate, under the coverture doctrine, unless she had *choses in action* unrecovered at the time of her death. But a case might arise, besides, where he had a just claim against her estate, and wished to enforce it by a sale of her real estate as administrator. Or he might intend to prosecute a suit. Or letters of administration might be desirable for the purposes of creditors. And peculiar considerations apply sometimes, as we shall presently see, to what we term the wife's separate property, even after her death. Cases, moreover, in these days are found, where a husband is made the executor under his wife's will.⁴

§ 406. *Purposes of Husband's Administration; Assets for Wife's Creditors.* — There is a common-law distinction between property acquired by the husband absolutely by virtue of

¹ 2 Kent Com. 135; *ib.* 410.

² *Cooper v. Maddox*, 2 Sneed, 135.

³ *Goods of Stephenson*, L. R. 1 P. & D. 285.

⁴ *Martin v. Foster*, 38 Ala. 688. See c. 5, *post*.

marriage, and property acquired in his representative capacity as her administrator or executor. The former is his own, free from all demands of his wife's creditors. But the latter comes to him only by way of distribution, after payment of all just debts against his wife's estate. A notable case in point is that of *Heard v. Stamford*, where a single woman contracted a debt for which she gave her promissory note of £50. She afterwards married, and brought to her husband a fortune of £700. On her death it appeared that the husband had acquired a portion of this fortune during coverture; the other portion was still outstanding at her death as a *chose in action*, and could only be recovered by the late husband as her administrator. Lord Chancellor Talbot decided that from the latter portion, after it had been recovered, the creditor should be satisfied; but that no claim could be enforced against the former portion.¹

This is a case of antenuptial debt, for which at the common law, he who married the woman indebted became responsible under qualifications, ceasing to be responsible, however, upon his wife's decease.² Debts contracted by the wife during marriage follow a somewhat different rule at the common law; for either they are the debts of the husband or no legal debts at all;³ and if his debts, he must be held responsible in his personal, and not a fiduciary capacity.

The modern change of policy with regard to a wife's debts, whereby the wife may hold separate property upon which her separate liabilities should be fastened, occasions an obvious departure in the latest decisions and statutes. As to her antenuptial debts, we have also seen that the statute tendency is to exempt the husband from liability during the marital state. Hence the statute rule now introduced into many States, that the husband shall be held liable as administrator on the estate of his wife for her debts, only to the extent of the assets received by him.⁴

¹ *Heard v. Stamford*, Cas. temp. Talb. 178; 8 P. Wms. 409; Macq. Hus. & Wife, 168. And see *Hetrick v. Hetrick*, 13 Ind. 44; *Donnington v. Mitchell*, 1 Green Ch. 248.

² *Supra*, §§ 91, 94, 322.

³ See *Hill v. Goodrich*, 46 N. H. 41; *Bain v. Doran*, 54 Penn. St. 124; *supra*, § 99.

⁴ See N. Y. Rev. Stat. Vol. II. p. 75; *supra*, § 322.

§ 407. Husband's Survivorship as affecting Wife's Personality.

— We have seen that at the common law, and conformably to the doctrine of coverture, marriage operates as a gift to the husband of the wife's personal property, both principal and income, whether acquired by her before or during the marriage state; but with this qualification, that so far as *choses in action* are concerned, or incorporeal personalty, he must reduce to possession while marriage lasts, in order to make the property absolutely his own.¹ Hence *choses in action* unrecovered at her death, belong, technically speaking, to her estate. The wife's earnings were the husband's;² and as to her chattels real, if he survived her, they became his absolutely.³ The wife's real estate remained subject to peculiar rules to be considered hereafter.⁴

In these days, it becomes important to understand how far the modern creation of a separate estate in the wife's favor may have modified this doctrine to the husband's detriment. The equitable rule, so familiar to England, has been that the separate use ceases with the marriage state; so that, subject to the restrictions of a trust under which the wife might have acquired any specific separate property, or her possible disposition of separate property during her lifetime (no clause of restraint impeding her), the surviving husband became entitled to whatever was left, under the rules and subject to the limitations of the common law. That is to say, as to personal property her *choses in possession* vested in him absolutely, and also her chattels real, while *choses in action* might be recovered for his benefit in due course of administration.⁵ The United States rule of equity appears to have treated the separate estate as ceasing upon the wife's death with similar consequences.⁶

Generally speaking, both in England and this country, the fact that a husband allows his wife to treat and deal with, as her own, property acquired by her independently of the married women's acts, is not inconsistent with his intention to assert his marital rights to it if he survive; neither if he

¹ *Supra*, § 148.² *Ib.*³ *Supra*, § 164.⁴ See next chapter.⁵ *Supra*, § 196. And as to real estate, see § 196, and next c.⁶ *Supra*, § 238.

allows her to dispose of the income and loan it on promissory notes running in her own name, would such income become thereby converted into her separate estate.¹ Moreover, the married women's acts themselves, in the absence of unequivocal language, do not change the common-law rule with reference to separate personal property of a married woman, not disposed of in her life nor by will; but it goes to her surviving husband by virtue of his marital rights in the same manner as under the old law.²

§ 408. **Husband's Administration for his Own Benefit; English Rule.**—By the English statutes of distribution, therefore (and perhaps by the common law), not only is the husband entitled to administer upon his wife's estate in preference to all others, but, subject to the payment of such debts as bind him upon surviving her, he recovers her outstanding personal property to his own use and enjoyment, including rights vested and contingent, and funds at her disposal during her lifetime or held in trust for her, save so far as he may be excluded by the terms of the trust. Even if he does not take out letters of administration, he is equally entitled to the property.³ He is therefore said, when he administers, to administer for his own benefit, being the party in interest preferred to all others, so far as personal estate is concerned. And since husband and wife are not, properly speaking, next of kin to one another, the title the husband thus acquires may be designated as a title *jure mariti* under the statutes of distribution.⁴

In certain instances administration is a legal prerequisite; as where, for instance, a sum is made payable to the "administrator" of J., a married woman.⁵

But with the modern recognition of separate use, an exercise of the wife's testamentary appointment may be found to interfere with the husband's rights both as surviving administrator and distributee; a subject which, together with

¹ *Ryder v. Hulse*, 24 N. Y. 372.

⁴ 2 Bl. Com. 515; *Watt v. Watt*, 3

² *Ransom v. Nichols*, 22 N. Y. 110; *Ves.* 246, 247; 2 Kent Com. 186, and *Wilkinson v. Wright*, 6 B. Monr. 576; authorities cited.

Brown v. Brown, 6 Humph. 127.

⁵ *Mitchell v. Holmes*, L. R. 8 Ex.

³ *Clough v. Bond*, 6 Jur. 60.

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the married woman's will, may deserve our later consideration.¹

§ 409. **The Same Subject; American Rule.**—The statutes of distribution in this country seem to have very generally adopted the English principle above stated, and to have given the husband the sole title to the wife's outstanding personal property upon her death, to the exclusion of her kindred, even to the exclusion of her own children.² Hence if the husband, after his wife's death, obtain possession of her personal property without taking out letters of administration, he may retain it against her next of kin, saving whatever precaution may be requisite as to debtors or creditors.³ And if the wife's next of kin administer, he will be a trustee for the husband or his representatives, in accordance with the English rule.⁴

But the principle that the husband administers exclusively for his own benefit on his wife's estate is incompatible with the legislation of some States. For in this country the modern tendency is not only to enlarge the wife's power of testamentary disposition,⁵ but to require administration to be taken out in all cases where a married woman with a separate estate dies intestate; nor is the surviving husband in all the States absolutely preferred to kindred either as administrator or distributee. The rule declared in Vermont is that *chooses in action* of the wife, not reduced to possession by her husband, during her life, nor as her administrator, by reason of his removal by the court, go to her heirs, according to the statute of descents and distribution.⁶ So in some other States the husband is entitled by law to a portion only of the balance in his hands

¹ *Post*, c. 5.

² *Ransom v. Nichols*, 22 N. Y. 110; *Moyer's Appeal*, 16 Penn. St. 405; *McCosker v. Golden*, 1 Bradf. Sur. 64; *Mobray v. Leckie*, 42 Md. 474.

³ 2 Kent Com. 136; *Donnington v. Mitchell*, 1 Green Ch. 243; *Jones v. Brown*, 84 N. H. 439; *Hawley v. Burgess*, 22 Conn. 284; *Stockett v. Bird*, 18 Md. 484; *Rice v. Thompson*, 14 B. Monr. 377; *Williams v. Carle*, 2 Stockt. 543; *Walker v. Walker*, 25 Mis. 387; *Clay v. Irvine*, 4 W. & S. 232; *Barnes v. Underwood*, 47 N. Y. 351; *Pickens v. Hill*, 30 Ind. 269.

⁴ *Hendren v. Colgin*, 4 Munf. 231;

⁵ *Setts v. Kimpton*, 2 B. & Ad. 278; *Hunter v. Hallett*, 1 Edw. Ch. 388; *Whitaker v. Whitaker*, 6 Johns. 112. See also statutes of the several States, which generally regulate the subject of administration and distribution.

⁶ *Post*, c. 5.

⁷ *Holmes v. Holmes*, 23 Vt. 765.

as administrator, or is postponed to her next of kin altogether; he is not allowed to succeed to her estate by virtue of his marital right without taking out letters of administration; nor to administer without accounting for his balances to the persons designated by statute as entitled to distributive shares.¹

§ 410. **Recovery of Assets by Wife's Administrator.** — The administrator of the wife who dies intestate may usually sue for assets belonging to the wife's separate estate;² though he cannot sue third parties upon *choses* which the wife during her life had herself lawfully collected.³ An action for a legacy due to a wife, or for other *choses* not reduced into possession during coverture, is properly brought in the name of her administrator after her death.⁴ And the rule would appear to be the same, though the consideration of the *choses* was the wife's real estate.⁵

§ 411. **Modern Claims as between Husband and Wife's Administrator.** — Postnuptial transactions between husband and wife give rise to delicate questions in the courts after the wife's death, where modern practice permits of an administration in conflict with the surviving husband's interests. Thus, money saved by the wife out of her earnings or allowance is ordinarily the husband's, and may be claimed as such by him;⁶ but where legislation makes the earnings a wife's separate estate, or the wife saved out of her separate property, such fund must be administered upon like her other separate property.⁷ And again, the wife's savings may have accrued as hers through her husband's gift or full permission,

¹ *Cox v. Morrow*, 14 Ark. 603; benefit of his children. *Gould v. Gould*, 99 Mass. 154; *Conigland v. Smith*, 79 Goree, 84 Ala. 565; *Baldwin v. Carter*, N. C. 808.

² *Kirkman v. Bank of Greensboro*, 77 N. C. 894.

³ *Willis v. Roberts*, 48 Me. 257; *Allen v. Wilkins*, 8 Allen, 321.

⁴ *Driggs v. Abbott*, 27 Vt. 580.

As to the survival of actions in suits for torts committed upon the wife, see *supra*, §§ 142, 144, 328.

⁵ *Supra*, § 295.

⁶ *Barrack v. M'Culloch*, 3 Kay & J. 110.

⁷ The husband of a deceased daughter may recover, as her administrator, her share of money arising from a policy, upon the death of her father, whose life had been insured for the

and hence must be dealt with as separate estate;¹ and where an executed gift of property is established from husband to wife, a court of equity will now uphold and enforce it against him, even after her death.² A note given to a wife by her husband for valuable postnuptial consideration may be regarded as constituting an equitable claim against him and assets in the settlement of her estate.³

Where, as part of the consideration on which money was given to the separate use of a married woman, she promised its repayment in case of her death then contemplated, such promise has been sustained in New York so that performance could be enforced against her estate after the event happened.⁴ In Massachusetts, the husband himself has been allowed to reclaim a note as against the wife's administrator, where it appears that he did not mean to part with the title, but only gave it to her for collection that she might use the proceeds for her support.⁵

Whatever the wife may have received therefore by way of transfer defeasible upon her death, or as an incomplete gift, or simply in trust as agent, may constitute the basis of a valid claim upon her estate.

§ 412. **Husband bound to bury his Wife; His wishes respected, &c.**—Every husband is bound, at the common law, to bury his deceased wife in a suitable manner; that is to say, he is bound to defray all necessary funeral expenses.⁶ Even when a wife dies who had been living separate from her husband, it is held that her surviving husband must provide her with a funeral at a reasonable expense; and, if he neglects to do so, any person who voluntarily employs an undertaker for that purpose and pays him for his services, is entitled to recover the sum thus expended from the husband in an action at law.⁷ So, too, where the wife died during the absence of

¹ *Supra*, § 296.

² *Supra*, § 385; *Gill v. Woods*, 81 Ill. 64.

³ *Huston v. Cone*, 24 Ohio St. 11; *supra*, §§ 395, 396.

⁴ *Herrington v. Robertson*, 71 N. Y. 280. Here the father had advanced money to his married daughter, upon

her promise of its repayment in case of her death during her approaching confinement.

⁵ *Corley v. Green*, 12 Allen, 104.

⁶ *Macq. Hus. & Wife*, 191.

⁷ *Ambrose v. Kenison*, 4 E. L. & Eq. 861; *Bradshaw v. Beard*, 12 C. B. n. s. 344.

her husband abroad, so that it was necessary for another to superintend the funeral.¹ And it is held that even an infant husband may contract for the interment of his deceased wife, or lawful children, so as to be bound by his contract. The contract will have validity, because it is a contract for the burial of those who are *personæ conjunctæ* with him by reason of the marriage, and as such it is to be regarded as a contract for his own personal benefit.²

These points were decided in England; and the subject seems to have received, until quite recently, little attention in the courts of this country. But it is believed that a similar rule prevails in most, if not all of the States; and there are several recent decisions in point to confirm this opinion.³ As to the further question, whether under the late married women's acts, and our modern policy of conferring upon the wife a separate estate, the husband's obligation binds him to such an expenditure absolutely, so that he can neither make a claim on her separate estate for reimbursement, nor take that separate estate, discharged of all marital trusts, as his own, subject to the settlement of just debts and charges, the burial expenses included, we cannot lay down with confidence at this stage.⁴

¹ Jenkins v. Tucker, 1 H. Bl. 90.

² Chapple v. Cooper, 18 M. & W. 252.

³ Smyley v. Reese, 53 Ala. 89; Sears v. Giddey, 41 Mich. 500; McCue v. Garvey, 21 N. Y. Supr. 562; Cunningham v. Reardon, 98 Mass. 538.

⁴ That a husband is proximately liable for his wife's funeral expenses, and is bound to bury his wife, admits now of no question. Even if an adult son assisted in giving orders to the undertaker, this does not relieve the husband. Sears v. Giddey, 41 Mich. 500. Smyley v. Reese, 53 Ala. 89, inclines to treat this obligation as one somewhat like that of supplying necessities, so as to deny to the husband any credit for such expenditure in the settlement of his wife's estate. But, on the other hand, it may be said that the expense of furnishing necessities is one to which a wife enjoying a separate for-

tune has the opportunity, while alive, of contributing, and that there is an inclination in several late cases to make her contribute. In case of her death, it seems harsh to deal with her fortune as though she meant to obligate her husband, regardless of the assets of her separate estate. And furthermore, her separate personal property, as equity and the common law have generally agreed, should go, subject to her debts, to her husband. The policy of the law appears, on the whole, best subserved by permitting the reasonable expenses of the wife's burial to be allowed to the husband out of the separate estate of the wife, as in the usual cases of administration. The husband gains thus scarcely any advantage, save where the modern rules of distribution, or for permitting the wife to make a will, operate to reduce his ancient title to all her personal property upon her decease,

In further recognition of the husband's paramount right in matters relative to his wife's burial, it is held in Massachusetts that a husband who has interred his wife in a public burial-ground is not liable as a trespasser for removing a gravestone, since placed at her grave by her mother, without injuring the stone, and for the purpose of substituting another;¹ and that the right of removing the remains is his.²

Certainly where separation took place under circumstances which should render the husband liable for his wife's subsequent support, he is liable for her necessary funeral and burial expenses also.³ But how far the divorce laws may affect the husband's obligation and right of burial is not yet clearly determined.⁴

§ 413. *Charging Burial Expenses, &c., upon a Wife's Estate; Subject continued.* — If a wife die leaving assets, while her surviving husband is a man without means or credit, there may be a serious disadvantage in denying payment of the burial expenses out of her estate; and the same is true of unpaid claims for necessities, including medical attendance, during her last illness. In England, chancery has, under pressing circumstances, bound the estate of the deceased wife with the payment of all such claims; for, it is held, a married woman may thus contract, either by express words or by just inference, so as to bind her separate estate in equity.⁵

§ 414. *Husband's Personal Liability for Deceased Wife's Debts and Engagements.* — The husband's liability for his wife's debts

and let others in to the beneficial enjoyment. In favor of thus charging her separate estate is *McCue v. Garvey*, 21 N. Y. Supr. 562.

It seems surely no violent presumption that a wife leaving separate property at her decease intended that distribution should be subject to both burial and administration charges; and, apart from this, a court of equity, to judge from the analogies, has a right to compel that either class of claims be paid from the assets when justice requires it. See, as to a wife's necessities, *supra*, § 324.

¹ *Durell v. Hayward*, 9 Gray, 248.

² See bill in equity in *Weld v. Walker*, 130 Mass. 423.

³ *Cunningham v. Reardon*, 98 Mass. 538. And see *Sears v. Giddey*, 41 Mich. 590.

⁴ See *post*, Part IX.

⁵ *Hodgson v. Williamson*, 42 L. T. 676; approving *Norton v. Turvill*, 2 P. Wms. 144, and disapproving *Vaughan v. Walker*, 8 Ir. Ch. 458. Here the woman lived apart from her husband, and the needful moneys were advanced by a stranger.

dum sola, under the early coverture rule, ceases at her death. His liability for her necessities, and upon contracts in general which she had made as his agent during her life, does not so terminate; for they are his contracts, and not hers. And it is held that where the husband, during coverture, pays the debt of his wife, contracted *dum sola*, in a specific article, and the title to that article fails, he remains liable for its value, notwithstanding his wife died in the meantime, and the title failed by reason of her unexpected death.¹

But, on the other hand, the husband of one who inherited personal property from a grantor who had conveyed land with covenants of warranty cannot be held liable, after her death, for a breach of the covenant.²

§ 415. **Death of Husband pending Settlement of Deceased Wife's Estate.** — Where the husband himself dies before the wife's outstanding personal chattels are recovered, his next of kin will be entitled to them in equity. This is the rule in England; also in America, wherever, at all events, the husband's right to administer for his own benefit is recognized; for it is the necessary consequence of that doctrine. But in England a somewhat circuitous course was formerly taken in such cases. The wife's next of kin were held entitled to letters of administration *de bonis non* of her estate not received by her husband during his life. But they were accountable as trustees for the legatees or next of kin of the husband.³ In this country, however, if the husband dies, leaving assets of his wife unadministered, the more rational rule has been that right of administration follows the right of estate, and devolves upon the husband's next of kin.⁴

¹ *Crawford v. Verry*, 12 Ind. 427. Under the Alabama Code the husband cannot, in settling the account of his deceased wife, as executor, have credit for debts contracted by her *dum sola*, and paid by him during coverture, but not shown to have been paid at her instance or request; *secus*, as to such payments made after he had qualified as her executor. *Martin v. Foster*, 38 Ala. 688. See *supra*, §§ 322, 324, as to modern changes in the old rule.

² *Howes v. Bigelow*, 13 Mass. 384. See remarks of Parker, C. J., *ib.*

³ *Bell Hus. & Wife*, 52; *Macq. Hus. & Wife*, 53, n.; *Humphrey v. Bullen*, 1 Atk. 468; *Squib v. Wyn*, 1 P. Wms. 378; *Cart v. Rees*, *ib.* 381; *Elliot v. Collier*, 3 Atk. 528.

⁴ *Roosevelt v. Ellithorp*, 10 Paige, 415; *Stewart v. Stewart*, 7 Johns. Ch. 229; *Bryan v. Rooks*, 25 Ga. 622; *Ward v. Thompson*, 6 Gill & J. 349; *Patterson v. High*, 8 Ired. Eq. 52.

And this seems to have been finally adopted as the English practice in such cases.¹ Whenever administration *de bonis non* of the wife is granted to a third person, in either England or America (subject to such statute exceptions as have been noted by way of qualifying the husband's rights as sole distributee of his wife's estate), this administrator is a trustee for the representatives of the husband in case the latter dies after his wife.²

In a late English case the defendant received money for a married woman, and wrote to her that he held it at her disposal. The wife died, and then the husband, who had not interfered in the matter; and the wife's administratrix sued the defendant for money had and received to the use of the wife. It was held that the wife's administratrix, rather than the husband's representative, could maintain the action.³

§ 416. **Death of Female Administratrix leaving a Husband** — In another English case a female took administration of the estate of a deceased person as creditor, got in a large part of the estate, and paid some of the debts; she afterwards married and died. The husband had taken possession of leaseholds, part of the estate, but no fund had been set apart for the payment of the wife's debt. It was held that administration of the unadministered effects of the deceased could not be taken by the husband in his own right as a creditor, but only as a representative of his wife.⁴

¹ *Fielder v. Hanyer*, 3 Hag. Eccl. 770; 2 Redf. Wills, 70; 1 Wms. Ex'rs, 380.

² English cases cited above; *Whitaker v. Whitaker*, 6 Johns. 112; *Hendren v. Colgin*, 4 Munf. 231; *Clark v. Clark*, 6 W. & S. 85; 2 Kent Com. 136, and cases cited; *Betts v. Kimpton*, 2 B. & Ad. 273; *Bryan v. Rooks*, 25 Ga. 622. By statute in New York the husband's executors and administrators take the property, and no administrator *de bonis non* need be appointed on the wife's estate. *Lockwood v. Stockholm*, 11 Paige, 87.

³ *Fleet v. Perrins*, L. R. 4 Q. B. 500; 637.

⁴ *s. o. L. R. 3 Q. B. 536*. But in this country it is held that where a legacy was given to a trustee for the use of a married woman, who died without having received it, and the husband afterwards died without having recovered it, the personal representative of the husband is entitled to a decree in equity, as against the personal representative of the wife, for such portion thereof as may have come to the hands of the latter, and against the trustee for the balance retained by him. *Coleman v. Hallowell*, 1 Jones Eq. 204.

⁵ *Goods of Risdon*, L. R. 1 P. & D.

CHAPTER II.

SURVIVING HUSBAND'S RIGHTS AS TO WIFE'S REAL ESTATE.

§ 417. **Husband's Freehold; by Marriage in Wife's Real Estate.**—The surviving husband's rights in the real estate of his deceased wife remain to be noticed. The immediate effect of coverture, as we have seen, is to invest the husband with the usufruct of all real estate owned by the wife at the time of her marriage, and of all such as may come to her during coverture; this usufruct being in the nature of a freehold, with beneficial enjoyment of rents and profits, and lasting, at all events, during their joint lives.¹ And, besides the rents and profits during coverture, the husband is entitled, as survivor, to all arrears accrued up to the time of his wife's death, together with the emblements or growing crops.²

An estate for the wife's own life terminates, of course, at her death, and the surviving husband has no concern with it; but if it be for the life of another person who survives her, the husband takes the profits during the remnant of the term as special occupant.³

§ 418. **Husband's Enlarged Freehold as Tenant by the Curtesy.**—But the husband at the common law may acquire, upon a certain condition, an enlarged life interest in his wife's lands, and in estates of inheritance of which she was seised in possession during coverture, so as to extend beyond her life if he survives her; in other words, he may be a tenant by the curtesy.⁴ Tenancy by the curtesy, or tenancy by curtesy, is a freehold estate in the husband for the term of his natural life. He acquires it by the fact that a child capa-

¹ *Supra*, §§ 167, and cases cited, 181.

² 2 Kent Com. 134; 1 Bright Hus.

³ *Id.*; *Matthews v. Copeland*, 79 N. C. 492.

⁴ *Wife*, 112, 113; *supra*, § 181.

⁵ See *supra*, § 167.

ble of inheritance is born of the marriage. The meaning of the term is somewhat obscure. Some have thought the word "curtesy" signifies the favor or curtesy with which the law regards the husband. Others that it comes from the Latin word *curtis*, and has reference to the feudal custom which permitted the husband, as soon as a son was born, to attend court as one of the *pares curiæ*, and do homage without his wife. But there is reason to believe that tenancy by the curtesy existed in the civil law during the reign of Constantine.¹ This privilege of the husband extends to all lands and tenements of which the wife was seised at any time during coverture, whether legal or trust estate, whether in fee-simple or by way of remainder or reversion.² The common law affords herein a rare but positive instance of public policy discriminating in favor of a marriage accompanied by the propagation of children.

§ 419. **The Four Essentials of Curtesy at the Common Law.**—Four things are essential, at common law, to entitle a husband to curtesy. *First.* A lawful marriage. *Second.* Seisin of the wife at some time during coverture. *Third.* Birth alive of issue capable of inheritance. *Fourth.* Death of the wife. After the birth of the child the husband's title to curtesy becomes possible; and the curtesy is then initiate. After the death of the wife the title to curtesy becomes complete; and the curtesy is then consummate.³

For a full description of curtesy, with its incidents, the reader is referred to elementary works on the law of Real Estate.⁴

§ 420. **The Essential of Seisin.**—Questions concerning the husband's curtesy are most commonly raised, however, with reference to the second essential above stated, namely, seisin of the wife at some time during coverture. Chancellor Kent says⁵ that the wife, according to the English law, must have been seised in fact and in deed, and not merely of a seisin in law, of some estate of inheritance. But he admits that this

¹ 1 Washb. Real Prop. 123, and authorities cited; 2 Bl. Com. 126 and notes by Chitty and others; Wright Ten. 103, 194; 2 Bright Hus. & Wife, 116.

² *Ib.*; Co. Litt. 30 a; *ib.* 29 a, n. 165; Watts v. Ball, 1 P. Wms. 109.

³ 1 Washb. Real Prop. 130.

⁴ See 1 Washb. Real Prop. 127 *et seq.*; Williams, Real. Prop. 8th ed. 218;

⁴ Kent Com. 27-35.

⁵ 4 Kent Com. 29, 30.

rule was relaxed in equity by a free and liberal construction; and he further intimates that in Connecticut, if not in some other parts of this country, there was a disposition to carry the principle still further. Seisin in law, without actual entry, is in many States at the present day deemed sufficient to give curtesy.¹

As for real estate settled or devised to the wife's separate use, curtesy originally could not be claimed of a use; but modern equity does not regard the husband as deprived of his usual right of curtesy in such property upon surviving the wife,² unless by the clear terms of the trust he has been excluded therefrom.³ And while the rule of equity is that the wife may exercise her power of disposition over separate property during her lifetime (not to speak of rights of testamentary disposition), her sole conveyance cannot generally be regarded as a regular disposition effectually to exclude curtesy.⁴

To entitle a husband to curtesy in the wife's equitable estate of inheritance, it is only needful that the requisites of such a title in legal estates existed. Actual possession of the estate, or the receipt of rents, issues, and profits by her, or possession by her trustee for her benefit, is a seisin of equitable estate equivalent to legal seisin, and sufficient.⁵ An antenuptial or postnuptial settlement by the husband upon his wife is not necessarily inconsistent with his rights of curtesy on surviving her.⁶ And the right extends to equities of

¹ *Wass v. Bucknam*, 38 Me. 356; *Watkins v. Thornton*, 11 Ohio St. 867; *Rabb v. Griffin*, 26 Miss. 579; *Stephens v. Hume*, 25 Mis. 849.

² *Lushington v. Sewell*, 1 Sim. 548; *Roberts v. Dixwell*, 1 Atk. 606; *Appleton v. Rowley*, L. R. 8 Eq. 139; *Cooper v. Macdonald*, L. R. 7 Ch. D. 288; *supra*, § 196; *Eager v. Furnivall*, L. R. 17 Ch. D. 115; *Young v. Langbein*, 14 N. Y. Supr. 151.

³ *Moore v. Webster*, L. R. 3 Eq. 267; *Withers v. Jenkins*, 14 S. C. 597. Such exclusion must be clearly expressed. *Cushing v. Blake*, 30 N. J. Eq. 689; *Ege v. Medlar*, 82 Penn. St. 86.

⁴ *Supra*, §§ 196, 240, 269; *Stokes v.*

McKibbin, 13 Penn. St. 267; *Pool v. Blakie*, 53 Ill. 496. But see as to the wife's technical right to bar entail and curtesy, where an equitable tenant in tail, *Cooper v. Macdonald*, L. R. 7 Ch. D. 288. And see *Robinson v. Buck*, 71 Penn. St. 386.

⁵ *Cushing v. Blake*, 30 N. J. Eq. 689. Possession by the husband as legal trustee is sufficient. *Taylor v. Smith*, 54 Miss. 50.

⁶ *Frazer v. Hightower*, 12 Heisk. 94; *Cushing v. Blake*, 29 N. J. Eq. 399; 1 Washb. 133. But as to an unqualified postnuptial settlement of all real estate upon his wife, see *Sayers v. Wall*, 26 Gratt. 354.

redemption, contingent uses, and moneys directed to be laid out in lands for the wife's benefit; which moneys equity treats as land.¹

But the husband cannot be tenant by the curtesy of the wife's estate in reversion or remainder, while there is an outstanding life estate not terminated; her interest must fall into possession before he acquires an inchoate right of which either he or his creditors can take advantage;² for there can be no curtesy where there was no seisin. And hence questions of great subtlety and difficulty may arise in respect to determinable estates, such as estates tail; while to complicate the issue still further, actual legal seisin with a formal entry is not held indispensable as formerly.³

§ 421. **Tenancy by the Curtesy, when Consummate; Tenant's Rights.**—Upon the birth of the child of a marriage alive, tenancy in the husband's right to curtesy is said to be initiate, and afterwards, upon his wife's predecease, consummate. The estate devolving thus upon the husband, without requiring further formalities on his part, and regardless of the circumstance of child or children still surviving, he enjoys the usual rights of a life tenant in his own right, including those of occupation; enjoying rents and profits during his term, together with his necessary fuel and other so-called reasonable *estovers*, and at his death leaving to his executors and

¹ 1 Washb. Real Prop. 130, 131, and cases cited. In many of the States curtesy is given, under statutes not recent, in equitable estates of which the wife was seised. *Ib.*; 1 Bro. C. C. 503, n. American edition.

² *Ferguson v. Tweedy*, 48 N. Y. 543; *Gibbins v. Eyden*, L. R. 7 Eq. 371; *Shores v. Carley*, 8 Allen, 425; *Moore v. Calvert*, 6 Bush, 356; *Hatfield v. Sneden*, 54 N. Y. 280.

³ 1 Washb. 130, 131. An intermediate estate less than a freehold, as a mere lease for years, would not defeat curtesy in the remainder or reversion. *Withers v. Jenkins*, 14 S. C. 597. Curtesy, like dower, is incident to estates held in coparcenery, or by tenants in common. *Carr v. Givens*, 7 Bush, 679.

And possession by some coparceners amicable as to others may sufficiently sustain curtesy to the husbands of such others. *Ib.* But as to lands held in strict joint tenancy, and going, upon the death of one, to the survivor, curtesy is excluded. 1 Washb. Real Prop. 135; Lit. § 35. Where the wife takes by devise an estate in fee, limited by an executory devise, which defeats or abridges the fee in case of the happening of a certain event, this is sufficient seisin to give the husband curtesy. *Hatfield v. Sneden*, 54 N. Y. 280. As to seisin held insufficient in lands of which the wife's mother was endowed, see *Upchurch v. Anderson*, 59 Tenn. 410.

administrators the right to obtain *emblems* or profits of the growing crop.¹

§ 422. *Tenancy liable for Debts; How barred, &c.*—The life estate devolving upon the surviving husband by way of curtesy consummate is liable to be taken for the husband's debts, as was also the estate initiate and marital interest, which we have considered elsewhere;² it cannot be defeated by his own disclaimer; nor does he take it without the incumbrances upon title under which it came to him, nor apart from the usual obligations of a life tenant to preserve unimpaired the rights of the inheritance during his temporary occupation.³

Divorce *a vinculo*, however, may have forfeited this estate;⁴ and such we may deem the usual effect of a husband's joinder with his wife, during her life, in a conveyance of her land, especially if the deed contain covenants of warranty, or a clear understanding be in some way manifested.⁵ Even the

¹ See 1 Washb. Real Prop. 88 *et seq.*, as to life tenants in general; *supra*, § 167; *Armstrong v. Wilson*, 60 Ill. 226. Where the land is in another's possession at the time of the wife's death, and no state of facts debars the surviving husband's right to curtesy, the husband may recover possession by action. *Hall v. Hall*, 32 Ohio St. 184. And see *Nesbitt v. Trindle*, 64 Ind. 183. But a lawful lessee ought to remain undisturbed during his term. *Forbes v. Sweesy*, 8 Neb. 520.

While the husband holds land as tenant by curtesy, those deriving title from his deceased wife cannot sue during his life. *Miller v. Bledsoe*, 61 Mo. 96. But the wife's heirs, who are remaindermen in fee of an equitable estate where the husband holds legal title as trustee of a resulting trust, may compel the life tenant by the curtesy, or his assignee, to convey to them the legal title in remainder. *Taylor v. Smith*, 54 Miss. 50.

² *Supra*, § 167 *et seq.*; 1 Washb. Real Prop. 141, and cases cited.

³ 1 Washb. Real Prop. 107, 141, and cases cited.

⁴ 1 Washb. Real Prop. 141; *post*, Part IX. See also *Koltenback v. Craft*, 36 Ohio St. 584. In North Carolina, statutes permit the husband to surrender his estate as tenant by the curtesy initiate, and let it merge in the reversion of the wife, on due understanding with her. *Teague v. Downs*, 69 N. C. 280. A fraud perpetrated by an intended wife, in conveying her lands to others, cannot deprive the husband of his marital rights of curtesy. *Robinson v. Buck*, 71 Penn. St. 366. The husband's own assignment or conveyance during his life, even if not literally extinguishing his curtesy, may debar him from claiming it against persons having a superior equity. *Shippen's Appeal*, 80 Penn. St. 391. As to the right of a judgment creditor, after the wife's death, to reach the husband's interest, on an issue of fraud, see *Curtis v. Fox*, 47 N. Y. 299. Cf. *Frazer v. Hightower*, 12 Heisk. 94.

⁵ *Supra*, §§ 174–177; 1 Washb. Real Prop. 152; *Stewart v. Ross*, 50 Miss. 776; *Carpenter v. Davis*, 72 Ill. 14.

wife's will, executed understandingly with the husband's assent, may operate to debar his curtesy;¹ or legal process for the wife's debts, or a sale under some appropriate proceedings where both spouses had created an incumbrance.²

§ 423. **Statute Modifications; Interests in Lieu of Curtesy.** — Of late years tenancy by the curtesy has become practically infrequent in England by reason of the prevalence of marriage settlements excluding such right.³ In this country it has existed in all of the older States, but is modified in some of them, expressly or by implication, by late statutes. In Iowa and Indiana, curtesy is expressly abolished, and a certain defined interest in the wife's real estate, of the dower sort, goes to her husband instead by way of inheritance. In Texas, California, Louisiana, and other States where the tenure of real estate comes from the community or civil law, rather than the common law, curtesy is not recognized. In some of the States the right of curtesy appears to be denied to husbands who wilfully neglect and desert their wives. In most New England States, as Maine, Vermont, Massachusetts, and Rhode Island, and in various other parts of the country, tenancy by the curtesy is expressly reserved by statute.⁴ It is decided that curtesy still exists in New York, though doubts were at one time entertained;⁵ and under statute qualifica-

¹ *McBride's Estate*, 81 Penn. St. 303. As to operation of the wife's own will to defeat, see *Clarke's Appeal*, 79 Penn. St. 376; c. 5, *post*.

² See *Stewart v. Ross*, 50 Miss. 776.

³ *Wms. Real. Prop.* 187; 1 Washb. Real Prop. 129.

⁴ See statutes of different States cited in 1 Washb. Real Prop. 258, and note; and notes to 4 Kent Com. 34. Statute provisions as to curtesy and dower are frequently alike. And see, as to the effect of the wife's deed of trust of her land in Iowa, where the husband did not release his "dower interest," and a sale was subsequently made under the trust, *Huston v. Seeley*, 27 Iowa, 183. For the law of Michigan, see *Hill v. Chambers*, 30 Mich. 422. As to the "dower" share, see also *Smith v. Zuckmeyer*, 53 Iowa, 14,

which declares it limited, as to either husband or wife, to one third interest. See also *Noble v. Noble*, 19 Ind. 431; *Conrad v. Starr*, 50 Iowa, 470.

⁵ *Hatfield v. Sneden*, 54 N. Y. 280; *Young v. Langbein*, 14 N. Y. Supr. 15. Cf. *Hurd v. Cass*, 9 Barb. 366; *Clark v. Clark*, 24 Barb. 581, with *Billings v. Baker*, 28 Barb. 348. *Seem* that the wife may here, under statute, defeat her husband's curtesy by her separate conveyance. *Thurber v. Townshend*, 22 N. Y. 517, which, of course, must be contrary to rule. Curtesy prevails in Illinois, Minnesota, Missouri, Wisconsin, Kentucky, Tennessee, Mississippi, and in nearly all the original thirteen States besides, notwithstanding married women's acts. *Armstrong v. Wilson*, 60 Ill. 226; 1 Washb. Real Prop. 129.

tions, or independently of them, curtesy obtains in the majority of States. Indeed, curtesy consummate, under the married women's acts, is found protected, notwithstanding the husband's usufruct during his wife's life is taken away or modified.¹

In South Carolina and Georgia the interest of the husband in his deceased wife's real estate is an absolute one in fee.² Ohio and Oregon statutes confer curtesy regardless of the birth of a child.³

§ 424. **Abatement of Real Estate Suits by Death.** — For an injury to the wife's inheritance in lands the husband cannot sue alone, since the cause of action will not survive to him.⁴ Consequently he cannot prosecute such an action after the death of the wife during the pendency of such a suit and before judgment.⁵ If the husband should die first, however, the suit will not abate, as he is not the real plaintiff.⁶

§ 425. **Surviving Husband's Claims against Wife's Real Estate.** — Inasmuch as the husband's interests in his wife's lands is limited to the usufruct as a life-tenant, and Anglo-Saxon policy has been that landed property should descend to one's blood relations, it follows that all claims presented by him against her real estate, after her death, in relation to such property, will be closely scrutinized. Thus it has been held that he cannot claim reimbursement for moneys paid in settling controversies in regard to the title of his wife's real estate.⁷ So where a husband was sued with his wife for her debt contracted before marriage, and secured by a mortgage of her land, and after her death voluntarily suffered judgment to be rendered against him for the amount of the debt, when he knew that he was not legally liable to a judgment, and paid the debt on execution, taking to himself no assignment of

¹ *Porch v. Fries*, 3 C. E. Green, 204; *Lynde v. McGregor*, 18 Allen, 182.

² *Hooper v. Howell*, 52 Ga. 315; 1 Washb. 129.

³ 1 Washb. 129; *Elliott v. Teal*, 5 Sawyer, 249.

⁴ *Clapp v. Stoughton*, 10 Pick. 463; *Fuller v. Naugatuck R. R. Co.*, 21 Conn. 657; *Com. Dig. Baron & Feme*, V.

⁵ 1 Bl. Com. 443; 1 Chitty Pl. 75; *Ryder v. Robinson*, 2 Greenl. 127; *Buck v. Goodrich*, 33 Conn. 87. And see *Deadrich v. Armour*, 10 Humph. 588.

⁶ 1 Chitty Pl. 22; *Little v. Downing*, 37 N. H. 355; *Jaques v. Short*, 20 Barb. 269.

⁷ *Campbell v. Wallace*, 12 N. H. 362; *Burleigh v. Coffin*, 2 Fost. 118.

the mortgage, but suffering it to be discharged altogether, it is held that he cannot seek indemnity from his wife's heirs either at law or in equity, even though he had misapprehended the legal effect of his consent to the judgment.¹

So the general rule is strict as regards improvements made by the husband upon his wife's real estate. The English doctrine is, that if the husband erects buildings upon his wife's lands, or otherwise makes permanent improvements thereon, expending his own money for such purpose, the presumption is that he intended the expense for his wife's benefit, and he cannot recover for it.² Several cases of this sort have come before our own courts quite recently, the claims being usually presented after the wife's death; and this principle has been rigidly applied, though doubtless occasioning in some instances positive hardship and wrong.³ And since the husband has no interest in improvements upon his wife's real estate, neither, of course, have his creditors.⁴ Agreements between husband and wife might vary the principle. If a husband improves his wife's land without any agreement for compensation, he cannot bring in a claim after her death, to be enforced either against her estate or her heirs.⁵ But where a husband, borrowing money on the security of his wife's lands, lays the money out in improvements thereon, with her manifest approval, equity will relieve him from liability, for repayment of the principal, while, as a tenant by the curtesy he would be bound to keep down the interest.⁶

At common law, where lands of the wife were converted into personalty, and sold by the joint deed and concurrence of husband and wife, the money, when collected, became the husband's.⁷ But equity was always disposed to regard the

¹ *Warren v. Jennison*, 6 Gray, 559. But see 2 Story Eq. Juris. § 1023; *Pitt v. Pitt*, 1 Turn. & Russ. 180; *Shrewsbury v. Shrewsbury*, 1 Ves. Jr. 238; *Jenness v. Robinson*, 10 N. H. 218.

² 1 Roper Hus. & Wife, 54; *Campion v. Cotton*, 17 Ves. 264; 1 Washb. Real Prop. 281.

³ *Burleigh v. Coffin*, 2 Fost. 118; *White v. Hildreth*, 32 Vt. 265; *Brevard v. Jones*, 50 Ala. 221. And see *Washburn v. Sproat*, 16 Mass. 449.

⁴ *Lichty v. Hager*, 18 Penn. St. 565; *Robinson v. Huffman*, 15 B. Monr. 80; *Corning v. Fowler*, 24 Iowa, 584; *Knott v. Carpenter*, 8 Head, 542; *Barto's Appeal*, 55 Penn. St. 386.

⁵ *Webster v. Hildreth*, 33 Vt. 457.

⁶ *Hanford v. Bockee*, 5 C. E. Green, 101; *Kirby v. Bruns*, 45 Mis. 234.

See further, as to improvements on the wife's separate lands, *supra*, § 272.

⁷ *Supra*, §§ 156, 172.

wife's intention in such transactions, and treat proceeds as real or personal estate accordingly; and such must be more strenuously the tendency of courts under the married women's acts.¹

CHAPTER III.

SURVIVING WIFE'S GENERAL RIGHTS AND LIABILITIES.

§ 426. **Widow's Right of Administration.** — On the dissolution of a marriage by the death of the husband, the widow is usually selected to administer upon his estate, provided she be willing and competent to take the trust. But her right of administration on her husband's estate is not coextensive with that of the husband on her estate. For in the one instance the husband is to be preferred to all others; whereas, in the other, administration may be granted by the court, at discretion, either to the widow alone, or to the next of kin, or to both together.² This is the law in England, and the same prevails generally in this country, under the statutes of the different States.³ The difference which the law makes as to their respective rights may help to explain why the right of the wife to administer should be less than that of the husband.

¹ *Supra*, §§ 215, 282; *Brevard v. Jones*, 50 Ala. 221; *Marshall v. Gayle*, 58 Ala. 284; *Carpenter v. Davis*, 72 Ill. 14. As to marital agreements for disposing of the curtesy interest so that the wife shall have full benefit of the proceeds, see *Teague v. Downs*, 69 N. C. 280.

² *Fawtry v. Fawtry*, 1 Salk. 36; 11 Vin. Abr. 92; *Anon.*, Stra. 552; *Love-las*, 3; *Macq. Hus. & Wife*, 145; *Case of Williams*, 3 Hag. Ecc. 217. See *Goods of Ihler*, L. R. 8 P. & D. 50, as to right of a widow having lived separately from her husband to administer.

³ 2 Kent Com. 410, 411, and notes. But by the New York statutes (vol. 2, p. 74, Rev. Stats.), the widow and next

of kin are designated. Grant of administration revoked, where it appeared that the marriage under which E. claimed to be widow was void. *O'Gara v. Eisenlohr*, 38 N. Y. 296. As to a widow's interest before the grant of administration, in order to pursue an intermeddler criminally, see *Mack v. State*, 68 Ala. 188.

As to administration *de bonis non*, of the husband's estate, where the widow took out administration, carried on her late husband's business, and then died intestate and insolvent, see *Fairland v. Percy*, 3 P. & D. 217. And see, generally, *Widgery v. Tepper*, 5 Ch. D. 516.

§ 427. **Widow's Distributive Share.**—Under the English statute of distributions, 22 & 23 Car. II. c. 10, the widow surviving her husband, who deceased intestate, is entitled to one third of the personal property which remains after payment of the husband's debts, while the remaining two thirds go to the children or their representatives.¹ The widow's share is not unfrequently termed her "thirds," or incorrectly her "thirds of personal estate at common law."² The statute further provides that when the husband dies intestate, leaving a widow only and no lineal descendant, the widow is entitled to a moiety or half of his personal estate, and the other half goes to the husband's next of kin. When there are no next of kin, the widow is not entitled to the whole of her husband's personal estate; but one half belongs to her, and the other half goes to the crown.³ Here, too, the wife's right is not coequal with that of her husband; for he surviving her takes the whole of her personal estate, while she surviving him cannot in any event be entitled to more than one half of his personal estate, even though the estate consisted wholly of property which belonged to her before marriage. It is held that the widow of a deceased child cannot take as a representative of such child under the statutes of distributions.⁴ The husband and wife, by a marriage settlement, may exclude one another from all benefits by way of distribution in their respective estates, other provisions having been substituted by way of recompense.⁵

In this country the statute of Charles II. is at the basis of our legislation regarding the estates of intestates, though modifications are frequently to be met with. Thus in Vermont, if there be no issue, the widow takes the whole estate, if not exceeding two thousand dollars, and one half of the residue above that sum. In Massachusetts, if there be no

¹ 2 Bl. Com. 515, 516.

² See Lord Cottenham, in *Gurley v. Gurley*, 6 Cl. & Fin. 741; *Macq. Hus. & Wife*, 146.

³ 2 Bl. Com. 515, 516; 2 Kent Com. 427; *Cave v. Roberts*, 8 Sim. 214. In certain localities of England a different rule prevails as to distribution of the

estates of intestates, the statute of distribution permitting the local customs to continue in force; as in the city of London and Provinces of York. 2 Bl. Com. 518.

⁴ *Price v. Strange*, 6 Madd. 161.

⁵ *Earl of Buckinghamshire v. Drury*, 2 Eden, 60.

issue, the widow takes the residue to the amount of five thousand dollars, and one half of the excess above ten thousand dollars. In New York there are statute provisions on the general subject of distribution quite full and minute. If no descendant or parent survive the husband, the widow takes two thousand dollars and one half of the surplus. But if there be no next of kin to the intestate, as near as nephew or niece, she takes the whole surplus. In Maryland the widow takes, as under the common law at the time of its colonization, her "reasonable share," which is one third or one half, according to circumstances. In Pennsylvania the law gives the same rights, so far as regards the widow and general kindred, as prevails in England under the statute of distributions. In Ohio the widow takes the entire personal estate after the debts are paid, if there be no children; and if there are any, she takes one half if the estate amounts only to four hundred dollars; and if it exceeds that sum she takes one third of the surplus. In Indiana, something like the community system in this respect has been lately adopted. In Georgia the widow's share in her intestate husband's personal estate is affected by her election to take dower. Where there is no widow or kindred, the State generally claims the balance under the statutory provisions, as in England; but if there be a widow, it is common in this country to give her the whole surplus in default of the husband's kindred; while it is moreover apparent, from the foregoing statute provisions, that American legislation strongly favors the widow as against distant kindred of the intestate.¹

§ 428. **Husband's Acts in Fraud of Wife's Distributive Claim.** — It is held that a bequest to the wife by the husband, in full of her legal claims, is no bar to her right to a distributive share in a lapsed bequest.² So acts of the husband during his lifetime, committed for the purpose of defrauding the wife of her distributive share in his personal estate after his decease, have been set aside in equity. Thus in Maryland, in

¹ See 2 Kent Com. 11th ed. 427, 428, and notes. And see *Dobson v. Dobson*, 30 Iowa, 410; *Sullivan v. McGowen*, 33 Ind. 139. ² *Garthshore v. Chalie*, 10 Ves. Jr. 1. But see *Wright v. Fearis*, 3 Swanst. 181.

a case where it appeared that the husband with such design had turned his personal into real estate, and had then executed conveyances of the real estate to other parties, while retaining the title-deeds in his own hands and keeping in possession of the premises, the conveyances were set aside after his death as a fraud upon his wife's lawful rights.¹ On the other hand, in Illinois, a husband's transfer of his personal property to his son, in consideration of an annuity for his own life, has been sustained as against his widow, even though made with the design of defeating her distributive rights.²

§ 429. **Widow's Waiver of Provisions under Husband's Will.** — The wife's privilege is carried even farther in Massachusetts and various other States by a statute which permits the widow to waive a provision made for her by her husband's will, and thereupon to take such portion as the law would have given her had he died intestate.³ But this privilege is accorded with some restrictions as to the full amount to be allowed her.⁴

The right on her part becomes complete upon her formal renunciation of the provisions under the will, without any surrender of property under the will.⁵ But her election must be strictly made within the time designated by statute.⁶ And it is to be inferred that the right of election is personal to herself, and cannot be exercised by her representatives or kindred after her death.⁷

§ 430. **Widow's Allowance.** — Another liberal provision made by the legislatures of some American States is that known as the widow's allowance. This is a reasonable sum, such as the Court of Probate may order, as necessities to the widow for herself and the family, or, if there be no widow, to the minor children. The allowance is set apart as some-

¹ *Hays v. Henry*, 1 Md. Ch. 337.

² *Padfield v. Padfield*, 78 Ill. 16.

³ Mass. Stats. 1861, c. 164; *Firth v. Denny*, 2 Allen, 468; *Towle v. Swasey*, 106 Mass. 100. Similar statutes are in force in other States. *White v. Dance*, 53 Ill. 413; *Stockton v. Wooley*, 20 Ohio St. 184; *Arrington v. Dortch*, 77 N. C. 387; *Cummings v. Cummings*, 51 Mo. 261; cases *infra*.

⁴ *Crozier's Appeal*, 90 Penn. St. 384; *Register v. Hensley*, 70 Mo. 189; *In re Wilber*, 52 Wis. 295.

⁵ *Register v. Hensley*, 70 Mo. 189.

⁶ *Waterbury v. Netherland*, 6 Heisk. 512. Here she had relied on the legal advice of the executor.

⁷ So held in *Crozier's Appeal*, 90 Penn. St. 384.

thing superior to the claims of general creditors, and is even preferred to the expenses of administration, funeral and last illness of the husband. The amount is at the discretion of the court; and where the husband has died insolvent, leaving few assets, it is not uncommon for the whole of the personal property to be thus awarded to the widow, whereby is afforded an expeditious means of settling perplexing little estates. This right is treated in Massachusetts as personal to the widow, provided she survive her husband; it does not pass to her representatives.¹ Nor is it considered in the same light as a distributive share; but the amount, if allowed, is generally to be regulated according to the necessitous circumstances of the widow and her family.²

§ 431. *The Widow's Paraphernalia.*—The widow's *paraphernalia* is a species of property recognized at the common law, though borrowed from the civilians. It consists of such articles of wearing apparel, personal ornament, and personal convenience as are suitable to a wife's rank and degree, and such as she continued to use during the marriage.³ The term *paraphernalia* is derived from the Greeks, and transmitted to England through the civil law. But while the wife's *paraphernalia* at the civil law resembled what we call the wife's separate property, the word itself has a more limited signification in England and America, being confined to personal necessities or ornaments, and having no possible application to real estate. Blackstone says the word signified "something over and above her dower;" whereas, as a late English writer observes, it really meant something of her own, not surrendered by her at her marriage; something reserved and kept back from the *dowry*, or fortune, which she brought her husband.⁴

¹ Otherwise in Indiana. *Bratney v. Curry*, 33 Ind. 390.

² Mass. Gen. Sts. c. 96, §§ 4, 5. See *Hollenbeck v. Pixley*, 3 Gray, 521; *Brazer v. Dean*, 15 Mass. 188; *Adams v. Adams*, 10 Met. 170; *Smith's Prob. Pract. (Mass.)* 106-109; *Sherman v. Sherman*, 21 Ohio St. 631. In Illinois, even a rich widow may claim the allowance. *Strawn v. Strawn*, 53 Ill.

263. See *Brooks v. Martin*, 43 Ala. 360, as to allowance of a "work horse." As to exemption of this allowance from liability, see *Davis v. Davis*, 63 Ala. 293. And see *King's Appeal*, 84 Penn. St. 345.

³ 2 Bl. Com. 436; *Macq. Hus. & Wife*, 147.

⁴ *Macq. Hus. & Wife*, 152. Our writers sometimes make confusion by

The common-law doctrine of *paraphernalia* is this: that the suitable ornaments and wearing apparel of a married woman, which she had at the time of her marriage, or which come to her through her husband before or during coverture, remain his personal property during his life, and he may sell and dispose of them during his life; but such as remain at the time of his death belong thenceforth to her absolutely as her *paraphernalia*.¹ It seems that he may even give them away while coverture lasts, in the exercise of his marital rights. For the loss thereof the wife cannot sue alone, but the husband sues as for his own property.² But he certainly cannot bequeath them to his wife; nor on principle dispose of them as *donatio causa mortis*.³

Paraphernalia are therefore to be distinguished from the wife's separate property, which we have considered, inasmuch as her rights are perfected, only when she becomes a widow; while the property is alienable not by herself, but by her husband, during his life.⁴ Such gifts from the husband are further to be distinguished from gifts bestowed solely upon the wife by her father, or by a relative, or even by a stranger. For in the latter instance they would be deemed gifts to her separate use; and then, if received with the husband's consent, neither he nor his creditors could afterwards dispose of them.⁵

Mere ornaments for a parlor are not to be treated as paraphernal property.⁶ Nor can articles be claimed as such which are, in fact, heirlooms.⁷ But a gold watch worn by the wife

citing maxims of Roman law in definition of English doctrines. See 2 Roper Hus. & Wife, 140; 1 Bright Hus. & Wife, 286, n. See *supra*, §§ 342, 343. In *Re Harrall*, 31 N. J. Eq. 101, the word "*paraphernalia*" appears to be used as synonymous with "separate estate," ornaments, &c.

¹ *Tipping v. Tipping*, 1 P. Wms. 780; 1 Rolle, 911, L. 85; Com. Dig. Baron & Feme, Paraphernalia; Macq. Hus. & Wife, 147, 148; *State v. Hays*, 21 Ind. 288. See *Rawson v. Pennsylvania R. R. Co.*, 48 N. Y. 212.

² *Hawkins v. Providence R.*, 119

Mass. 596; *McCormick v. Penn. Central R.*, 49 N. Y. 303.

³ 2 Bl. Com. 430; Noye's Max. ch. 49.

⁴ Cro. Car. 844; Com. Dig. Baron & Feme, Paraphernalia. The paraphernalia differ also from the wife's pin-money. *Supra*, § 291. Married women's acts may, of course, render the wife's clothing, jewelry, &c., absolutely her own. See *supra*, Part V., ca. 6, 7.

⁵ 2 Story Eq. Juris. 555.

⁶ *Graham v. Londonderry*, 3 Atk. 393.

⁷ *Calmady v. Calmady*, 11 Vin. Abr.

181, 182.

of one who maintains a fair social position may be treated as paraphernal.¹ A "necessary bed" is paraphernal.² Jewels purchased by the husband and worn by the wife with her other ornaments, it is said, become her *paraphernalia*, in absence of evidence to the contrary; while family jewels, by merely being worn by the wife, do not.³ Where a piece of jewelry, in possession of the husband at the time of marriage as an heirloom, is greatly enhanced in value by adding new diamonds, and is then given to the wife to wear, though bequeathed to his heirs, the rule, as laid down by Lord Chancellor Macclesfield, is to separate the new diamonds after the husband's death, and bestow them upon the widow as her *paraphernalia*, leaving the heirs to enjoy the residue.⁴ And the old books say that if the husband delivers cloth to his wife for her apparel, and dies before it is made up, she shall have the cloth.⁵ The question of value is not material in setting off the widow's *paraphernalia*, so long as the articles are suitable to her degree.⁶ And while the modern cases which turn on such questions are rare, especially in this country, it cannot be doubted that a liberal rule would at this day be applied in the widow's favor.

As to personal ornaments, it seems to be an important element in the title, that the wife should be seen to wear them at intervals. Particularly is this true where the husband kept them in his own possession, for otherwise it might be said that he never gave them to her. But it is enough to establish her claim that he had allowed her to wear them on birthdays or other suitable occasions.⁷

Paraphernalia would seem to be so far personal to the widow, that if not claimed by her during her lifetime, they cannot after her death be demanded by her executor or administrator. Accordingly, it is held that if the husband should bequeath them to her for life and then over, and she should make no election to have them as her paraphernal

¹ *Tillexan v. Wilson*, 43 Me. 186.

² 1 Rolle, 911, L. 35; Com. Dig.

³ See Com. Dig. Baron & Feme, Paraphernalia.

Baron & Feme, Paraphernalia.

⁴ *Ib.*; Macq. Hus. & Wife, 148.

⁵ *Jerroise v. Jerroise*, 17 Beav. 566.

⁷ *Graham v. Londonderry*, 3 Atk.

⁶ *Calmady v. Calmady*, 11 Vin. Abr. 393, 181, 182.

goods, her representative after her decease would be excluded.¹ But in a recent English case, not only was the committee of the widow, being a lunatic, permitted to elect in her stead while she remained alive; but upon her subsequent death, her next of kin were allowed to come in and choose whether to take the *paraphernalia* or the benefits given her under her husband's will; and, upon their choice of the former an order in chancery was made accordingly.²

§ 432. *Incidents of Paraphernalia.* — The wife's paraphernal property is subject to her husband's debts during his life; for in truth it is not then her property at all.³ Nor can she maintain an indictment against any one who steals it, while her husband is alive.⁴ So, too, it is liable for his debts after his death, when there is a deficiency of assets in the administrator's hands.⁵ But even then her necessary clothing is protected; for, in the words of an ancient judicial resolution, "She ought not to be naked or exposed to shame and cold."⁶ And in many of the United States there are at the present day statutes which justly reserve to the widow, in any event, necessaries in the house at the time of her husband's death, and the ornaments and clothing of herself and children.⁷

If a husband pawn his wife's *paraphernalia* as collateral security for money borrowed, and give power to the lender to sell for a sum certain during his absence, this will not be deemed an absolute alienation, but shall stand as a pledge redeemable by the widow; and if the husband have left sufficient to redeem (after payment of all his debts), she is entitled, under the rules of equity, to have the redemption money raised out of his personal estate.⁸ But creditors must

¹ *Macq. Hus. & Wife*, 150; *Clarges v. Albemarle*, 2 Vern. 246; *Com. Dig. Baron & Feme, Paraphernalia*.

² *In re Hewson*, 28 E. L. & Eq. 283.

³ *Tllexan v. Wilson*, 43 Me. 186; 1 *Bright Hus. & Wife*, 288.

⁴ *State v. Hays*, 21 Ind. 288.

⁵ 2 Bl. Com. 486; *Macq. Hus. & Wife*, 147, 149; *Snelson v. Corbet*, 3 Atk. 369; *Howard v. Menifee*, 5 Pike, 668; *Ridout v. Earl of Plymouth*, 2 Atk. 104.

⁶ 1 Rolle, 911, L. 85, cited in *Macq. Hus. & Wife*, 147.

⁷ See *Mass. Gen. Sts. c. 96, §§ 4, 5*; *Ginochio v. Porcella*, 3 Bradf. Sur. 277.

⁸ *Graham v. Londonderry*, 3 Atk. 393. In *Re Harrall*, 31 N. J. Eq. 101, this same rule is applied in equity to the guardian of a lunatic husband, who pawned the wife's jewels, while sane, to pay his personal expenses, the lunatic's estate being ample. Here the lunatic was still alive, which makes the case somewhat anomalous; though, *semble*,

first be satisfied in all cases; though the widow's right in respect to such property is superior to that of any legatee of the husband.¹

Real estate is to be appropriated, in payment of the husband's debts after his death, before the widow's paraphernal property can be held subject to the demands of his creditors. Such at least is the English practice; and where paraphernal property has been used up by the executor or administrator in satisfaction of specialty debts, the widow is allowed, in equity, to stand in their stead to reimburse herself out of the real estate in possession of the heir.² In this country a summary sale of the husband's real estate, under direction of the Probate Court, is usually requisite, where the personal assets in the hands of his executor or administrator prove inadequate to meet the debts, whether by specialty or simple contract.³

§ 433. **A Wife's Letters belong to her.** — Letters written to a wife by a former husband belong to her and not to his estate; and her own gift of them is valid as against the executor of such estate or her second husband.⁴

§ 434. **Wife's Equity of Redemption of Mortgage, &c.** — We have already observed that a wife may join with her husband

a wife's ornaments were here treated as her separate property.

¹ *Ib.*; *Tipping v. Tipping*, 1 P. Wms. 729; *Ridout v. Earl of Plymouth*, 2 Atk. 104; *Burton v. Pierpont*, 2 P. Wms. 80. And even though contingent assets come to hand afterwards, the wife's claim is gone. *Ib.*

² *Snelson v. Corbet*, 3 Atk. 870; *Aldrich v. Cooper*, 8 Ves. 397; 2 Roper Hus. & Wife, 144; *Macq. Hus. & Wife*, 149. Probably in England, since the statute 3 & 4 Will. IV. c. 104, which makes lands of all kinds assets for the payment of debts, the lands are absolutely assets for satisfaction of the widow's claim. *Bell Hus. & Wife*, 215.

³ An English writer of excellent authority on this subject distinguishes between the case where the devised estate is subject to a charge or trust for the payment of debts from the case where the devised estate is not so sub-

jected. In the former case he holds the widow entitled to have the assets marshalled as against the devisee; but not in the latter case. Note by Mr. Jacob to 2 Roper Hus. & Wife, 145. We find no authority to support this distinction. It would certainly trench closely upon her right to hold such property against all bequests of her husband to others; a right which is clearly admitted in the English courts. 2 Bl. Com. 436. A bequest from husband to wife of all the household goods, furniture, plate, jewels, and the like (including what in point of fact are *paraphernalia*), does not debar the widow from claiming her paraphernal property as such, if she chooses to set up her lawful privilege as against her husband's bequest. *Marshall v. Blew*, 2 Atk. 217; *In re Hewson*, 23 E. L. & Eq. 283.

⁴ *Grigaby v. Breckenridge*, 2 Bush, 480.

in executing a mortgage of her general real estate as security for his debts, and that, if this mortgage be properly foreclosed, and equities of redemption barred, her right to the real estate is gone.¹ We have also seen that the wife's separate real estate may be thus encumbered.² Yet the courts have gone as far as they consistently could in upholding the wife's title under such circumstances, and in allowing her all the privileges of a surety.³ In the first place, they favor her right to the equity of redemption as against her husband; in the second place, they allow exoneration or reimbursement from her husband's estate, after his death, where the assets prove sufficient for that purpose.

In general, therefore, it is ruled in courts of equity that the equity of redemption remains in the wife and her heirs. Accordingly, when the marriage is dissolved by the death of the husband, the widow, or her heirs after her, may put this equity in operation. It must therefore be quite manifest, as to the wife's general real estate, that a change of property was intended during the husband's life before his widow can be excluded.⁴ Thus, where the general land belonging to the wife was mortgaged, and the equity of redemption was in words reserved to the husband and his heirs, the court held that there was nevertheless a resulting trust for the wife and her heirs.⁵ And the rule is general that where husband and wife mortgage the wife's estate, and the equity of redemption is reserved to the husband and his heirs, without recital of special circumstances to show an intention to make a new settlement of the estate, the husband has the equity of redemption only *jure uxoris*.⁶ And in considering this question the mere form of the reservation of the equity of redemption will not of itself be held sufficient to alter the previous title. In such a case (where fraud is out of the question) it is supposed to arise from inaccuracy or mistake, which is to be explained and corrected by the state of the title as it was before the mortgage.⁷

¹ See *supra*, § 176, and cases cited.

² *Supra*, §§ 246, 274, 276, and cases cited.

³ As to these privileges, see *supra*, §§ 177, 246, 274.

⁴ *Macq. Hus. & Wife*, 172.

⁵ *Jackson v. Jones*, 1 Bli. 115.

⁶ *Ruscombe v. Hare*, 6 Dow, 1.

⁷ Per Lord Redesdale, in *Jackson v. Innes*, 1 Bli. 115.

But in the leading English case of *Jackson v. Innes*, which came before the House of Peers, on appeal from the decree of Lord Eldon, in the Court of Chancery, the rule in the wife's favor was limited at this point. And it was decided, after a full examination of the previous cases on the subject, that wherever the transaction, importing more than a mere mortgage security, gives satisfactory evidence of an intention to effect a change of the beneficial interest, the husband and his heirs, and not the widow or her heirs, will be entitled to the equity of redemption.¹ The learned opinion in this case was given by Lord Redesdale, and Lord Eldon subsequently admitted his own error in laying down a contrary doctrine. This case has since remained as the correct exposition of the English law on this subject. And it may be added, in the emphatic language of Lord Eldon on another occasion, "If it clearly appear to have been the intention of the wife that the husband should have the equity of redemption, he *must* have it."²

§ 485. *Wife's Equity of Exoneration.*—To the wife also belongs the right in equity to have her estate exonerated out of her husband's personal and real assets. This is known as the wife's equity of exoneration. The principle is that the wife, when mortgaging her property for her husband's debt, stands in the position of a surety, and therefore may claim indemnity from the principal for whose benefit her security was interposed.³ Lord Hardwicke has announced this rule with clearness and precision.⁴ The husband's other creditors have no preference over the wife on marshalling the assets of her husband's estate; but she is entitled to the benefit of any

¹ *Id.* See also Sir John Leach, in *Reeve v. Hicks*, 2 Sim. & Sta. 403.

² *Ruscombe v. Hare*, 6 Dow 1. It is said that the case of *Jackson v. Innes* is the only marked instance in which a judgment of Lord Eldon's was ever reversed. And the generous candor with which the learned lawyer admitted his error serves as a memorable example to the courts of successive generations. To Lord Redesdale, whose politics kept him in comparative seclusion most of his life, though his professional repu-

tation was great in his day, a most appropriate tribute is paid by Mr. Macqueen, in his excellent treatise, p. 180, note.

³ *Macq. Hus. & Wife*, 181; *Bell Hus. & Wife*, 195; *Wotton v. Hele*, 2 Sand. 177; 1 Mod. 290.

⁴ *Robinson v. Gee*, 1 Ves. Sen. 252, per Lord Hardwicke; *Partridge v. Fowler*, 2 Atk. 384; and see Lord Thurlow, in *Clinton v. Hooper*, 1 Ves. Jr. 186, to the same effect.

securities, and to have satisfaction of her debt according to its rank. But the widow may waive her right of exoneration from the estate of her deceased husband, and her waiver will be inferred from circumstances.¹

In this country, as we have seen, the wife is regarded as her husband's surety, and the presumptions are in her favor.² The rule as to her equity of redemption is doubtless quite as liberal as that laid down by Lord Redesdale in England. Perhaps it is more so, but authoritative cases on this point are wanting, and recent statutes affect the whole subject. In New York, the widow's right of exoneration is expressly admitted.³ And in other States, the wife's rights as surety, with reference to debts of her late husband, for which she has mortgaged her land, are very strongly favored.⁴

Where the property mortgaged is the wife's separate land, not only must her right to exoneration be a strong one,⁵ but the presumption in her favor as to retaining the equity of redemption to herself, must be well nigh conclusive, unless it is apparent that she intentionally surrendered her right, and for a fair equivalent.⁶ In general, as to the wife's separate property or its income, where the circumstances do not warrant the inference of her assent or acquiescence to the appropriation thereof by her husband, or in his mode of applying it, she may claim reimbursement out of his estate.⁷

§ 436. **Widow's Controversies with Administrator.** — Controversies between a widow and her husband's administrator are not unfrequent; and it is manifest that at the common law the widow's situation with reference to personal property, which she had brought with her into the marriage state, was often extremely hard. Thus, it is even held that a widow cannot recover from her husband's administrator goods which

¹ *Bell Hus. & Wife*, 195; *Clinton v. Hooper*, 1 Ves. Jr. 188. But see *Lancaster v. Evors*, 10 Beav. 154.

² See *supra*, § 274.

³ *Vartie v. Underwood*, 18 Barb. 561.

⁴ *Philbrooks v. McEwen*, 29 Ind. 347; *Hetherington v. Hixon*, 46 Ala. 297; *supra*, § 274, and cases cited.

⁵ See *Kinner v. Walsh*, 44 Mo. 65; *supra*, § 274.

⁶ *Supra*, § 274, and cases cited.

⁷ *Supra*, §§ 248, 401. But such claims, especially of income, are by no means to be favored without good proof. *Hill v. Hill*, 88 Md. 183. And the usual Statute of Limitations will run against them. *Sabel v. Slingluff*, 52 Md. 132.

came to her as a wife, although her husband abandoned her before she received them, and never returned or claimed them, and she had held and claimed them as her own for more than twenty years.¹ But equity protects restrictions imposed on trust funds for her benefit, even as against her own indiscreet conduct.² Nor are instances wanting where a widow's hasty, inconsiderate, and foolish acts with reference to property rights acquired by her in her deceased husband's estate have been deemed inoperative; her distributive share and allowances being preserved for her by the courts as against herself, so to speak.³

A widow must not intermeddle with her late husband's estate, nor assume duties which properly devolve upon the executor or administrator. Hence a widow cannot surrender an unexpired lease held by her husband, and take another lease in her own name; for manifestly the lease should go to the benefit of the estate as assets.⁴ She is bound by a *bona fide* administrator's sale, made with her consent.⁵ And, when administratrix herself of her husband's estate, she is expected to enjoy the usual rights and assume the usual responsibilities pertaining to the office.⁶

§ 437. **Widow's Right and Duty to bury Husband.** — The common-law obligation of the widow to bury her deceased husband rests upon weaker foundations than the corresponding obligation of the husband. In truth it seems somewhat inconsistent with the doctrine of coverture; for why, it may be asked, should a woman answer for the indigence of one whose lawful privilege it was to strip her of her own means of support? Where the husband leaves an estate, the funeral expenses are to be paid by his executor or administrator, and

¹ Bell v. Bell, 37 Ala. 536.

² Dunn v. Lancaster, 4 Bush, 581; Separate Property, Part V., *supra*. And as to preserving the wife's separate trading capital after her husband's death, see *supra*, § 308; *Re Peacock's Trusts*, L. R. 10 Ch. D. 490. A widow who is administratrix, and carries on her husband's business for the benefit of his estate, will be presumed to manage it in her trust capacity, and should sue

or be sued accordingly. *Moseley v. Rendell*, L. R. 6 Q. B. 338.

³ See *Maull v. Vaughn*, 45 Ala. 134; *Cammack v. Lewis*, 15 Wall. 643.

⁴ *Keating v. Condon*, 68 Penn. St. 75. And see *Leach v. Prebster*, 35 Ind. 415, as to intermeddling with a remainderman's rights.

⁵ *Anderson v. McGowan*, 45 Ala. 462.

⁶ See *Ready v. Hamm*, 46 Min. 422; *Fox v. Doherty*, 30 Iowa, 334.

not by his widow. This is the rule both in England and America; and it is doubtless reasonable so far as it goes.¹ But in an English case, decided not many years ago, the court seemed to regard this subject somewhat differently, and intimated that husband and wife should stand upon a like footing, as regarded the obligation of burying one another.² Here a widow, who was also an infant, was held bound by her contract for the expense of her husband's interment. The decision proceeded upon the ingenious doctrine, that, since a husband ought to bury his wife and lawful children, who are the *personæ conjunctæ* with him, as a matter of personal benefit to himself, the wife should do the same by her husband, as a benefit and comfort to herself; and therefore that the case comes within the rule of law which makes a contract good where the infant is a gainer by it. If the husband's estate is sufficient, it ought to bear the expense of his burial.

§ 438. *Wife's Agency for Husband after his Death.* — Where a married woman contracts with authority from her husband, and the husband dies suddenly, and in point of fact before certain purchases were made on his credit, is his estate liable, or is his widow; or must the creditor bear the loss? The general rule undoubtedly is that the authority of an attorney or agent expires with the principal. A dead man can have no one acting by his name and authority. And since the wife contracts only as her husband's agent at the common law, her case would seem to fall within the general doctrine. Such in fact was the ruling of the court in *Blades v. Free*, where a man who had some years cohabited with a woman, who passed as his wife, left her and her family in England, and went into foreign parts, where he died.³ Here it was held that the executor was not bound to pay for necessities supplied to her after his death, although before information of the event had reached her. In this case, however, there was only a *quasi* widow, and perhaps the court felt the stigma of an illicit cohabitation. But the precedent proved a stum-

¹ 2 Redf. Wills, 224; 2 Wms. Ex'rs, 871; Macq. Hus. & Wife, 183.

² Chapple v. Cooper, 13 M. & W. 252.

³ 9 B. & Cr. 167; 4 Man. & Ry.

bling-block in the next case of *Smout v. Ilberry*.¹ A man who had been in the habit of dealing with a butcher for meat supplied to his house, went abroad, and his wife, who remained at home, continued the employment of the butcher. Here it was held that she was not personally liable for meat supplied after her husband's death, and purchased by her in good faith, supposing him to be still alive. The principle of the latter case seems to have been, that, although the authority had expired, yet the agent was not in fault, nor in the commission of any fraud; that the revocation occurred by act of God. But the loss had to fall somewhere; so the court put it upon the butcher. These seem to be the only cases of importance on this subject in England; and we find none in this country to shed further light. Yet questions of this sort must frequently arise in the dealings of people. The modern inclination is clearly to relax somewhat the rigid rule of the common law of agency and to favor the Roman doctrine, which binds the principal or his estate in respect to acts done in good faith by his agent before notice of revocation.²

It is held that where family necessities are purchased and brought into the house during the last illness of the husband, and are used in part while he is sick and in part at his funeral, his estate is liable to the person who furnished them.³ For necessities furnished the family while the husband was living, too, under circumstances rendering him legally liable, the wife cannot be sued after his death; and even if she then promise to pay them, the promise is without consideration, and not binding upon her.⁴

¹ 10 M. & W. 1.

² Story Agency, §§ 438, 497, and notes, in 8th edition. See Bradford, Surrogate of New York city, in *Ginochio v. Porcella*, 3 Bradf. Sur. 277, in which this subject is ably discussed, though the case in question, upon a close examination, appears to have decided little or nothing. This able lawyer evidently leans against the authority of *Blades v. Free*, though he expresses himself very guardedly. See also Macq. Hus. & Wife, 129, to the same purport; also *Terry's Appeal*, 55 Penn. St. 344,

where the wife had been deserted by her husband. But a bond given by a husband for the board and expenses of his wife at a hospital is terminated by his death. *Stinson v. Prescott*, 15 Gray, 336. The question of notice does not appear to have arisen in this case, and in fact the wife was not treated as her husband's agent, in the usual sense.

³ *Sterling v. Potts*, 2 South, 773.

⁴ *Smith v. Allen*, 1 Lans. 101; *Carter v. Wann*, 45 Ala. 343. See further as to modern changes in the law of a wife's necessities, and her contract

§ 439. **Reviving Promises made during Coverture; Reacknowledging Deeds, &c.** — A widow may by a fresh promise subsequent to coverture, involving a good consideration, render herself liable upon a money obligation, contracted while coverture lasted;¹ though in general a wife's promise to pay, after becoming discoverd, that for which her estate was not liable in equity or otherwise during the marriage state, would seem to be *nudum pactum*.² One might, contracting for services relating to her separate estate or for its express benefit, and then becoming a widow, render herself liable to suit,³ and so make forbearance to sue the basis of a new promise; but to contract after marriage with reference to debts which policy refuses to regard favorably while marriage lasts is a different matter.⁴

A widow, by reacknowledging a deed improperly executed by her while married, has been held to give it full validity and force, without signing anew or making a new conveyance.⁵ But covenants in her deed executed with her husband during his lifetime rarely if ever bind her after his death, unless statute changes the common-law rule.⁶

§ 440. **Surviving Wife's Interest in her own Property.** — The wife's lands, if she survives her husband, are absolutely hers and subject to her unimpeded dominion and control. But as to her general real estate her rights have been suspended during coverture,⁷ and in the adjustment of her husband's life interest questions may arise with his administrator, while her separate real estate, subject to the terms under which she may have acquired it, has been in theory under her dominion continuously.⁸ Chattels real at the common law, such as leases, vest absolutely in the surviving wife, so far as they remain unappropriated by the husband during his life; and they are hers unaffected by his will.⁹

disability, *supra*, §§ 324, 325, and cases cited; also § 322, as to the wife's antenuptial debts; and § 328, as to survival of torts committed upon the wife

¹ Wilby v. Elgee, L. R. 10 C. P. 497; Goulding v. Davidson, 26 N. Y. 604.

² Felton v. Reid, 7 Jones, 269.

³ King v. Mittelberger, 50 Mo. 182. ⁴ This doctrine is not at present very clearly settled, however. See Mize v. Hawkins, 54 Ga. 500.

⁵ Riggs v. Boylan, 4 Biss. 445.

⁶ *Supra*, §§ 174, 177.

⁷ See *supra*, §§ 167, 172.

⁸ *Supra*, §§ 196, 197, 234.

⁹ *Supra*, §§ 164, 166.

The wife's personal property vested at the common law so completely in her husband, absolutely or potentially, that her right on surviving him was restricted to *choses in action* not already reduced by him to possession.¹ But her separate personal property, legal or equitable, continues hers intact, whether it consists of *choses in possession* or *choses in action*, corporeal or incorporeal personalty, or both together, with only a freer power of disposition, perhaps, upon her becoming discovert.²

§ 441. **Husband's Gift to Wife Causa Mortis.** — If the husband may will his property to his wife, or make her a gift *inter vivos*, so, doubtless, may he confer title upon her after death by his gift *causa mortis*.³ But to give one's own note before he dies is not a valid gift *causa mortis*; nor will even the meritorious consideration arising out of the duty of a husband to support his wife suffice, in equity, to sustain his promissory note given to his wife as against the rights of the kindred surviving him.⁴

§ 442. **Husband's Will; Revocation; Widow's Election of Benefits.** — The marriage of a man, whether widower or single, is not generally deemed a sufficient revocation of his will; though marriage and the birth of issue has unquestionably this effect, both at the civil and common law.⁵

A widow having a choice of benefits may be put to her election between them. Thus, statutes frequently provide that she may elect between other provision made for her in her husband's will and her right to dower, within reasonable time after her husband's death; this doctrine assuming that under all the special circumstances the two rights are to be construed as incompatible, and that thus the testator intended.⁶ But the husband cannot by his will put the widow

¹ *Supra*, § 148.

² *Supra*, §§ 197, 234. The married women's acts tend to enlarge the wife's sole responsibility and right of disposition as to her personal property. *Supra*, §§ 287, 289, 330.

³ *Whitney v. Wheeler*, 116 Mass. 490. As to gifts *causa mortis*, see 2 Sch. Pers. Prop Part V. cs. 5, 6.

⁴ *Whitaker v. Whitaker*, 52 N. Y. 368.

⁵ 1 Redf. Wills, 4th ed. 298; Inst. l. 2, c. 13, § 5; 1 Jarm. (ed. 1861) 115; *Christopher v. Christopher*, Dick. 445. Circumstances may arise where both wills should be admitted to probate.

⁶ *Thompson v. Burra*, L. R. 16 Eq.

to her election as to property vesting in her by survivorship.¹

§ 443. *Death or Remarriage of Widow.*—The death or remarriage of the widow may complicate the settlement of an estate. Where a widow dies, who had brought, with her husband, during his lifetime, a real-estate action for rent which lawfully survived to her, her executor or administrator is entitled to the rents accruing up to her death, while those accruing subsequently belong to her heirs and devisees.² The widow's purchase in consideration of her dower interest may be enforced after her death, by the unpaid vendor, as a lawful claim against her estate.³

A statute in Indiana restrains a widow who remarries from alienating the real estate which comes to her by virtue of her former marriage; the object being partly to protect her against injudicious transfer of the same in her changed relation, and partly to preserve the property for children (if there be any) of the marriage under which it came to her.⁴

A woman is not liable, after a second marriage, for the tortious acts of her second husband intermeddling with the assets of the first husband's estate, whether such acts be com-

592; *Rogers v. Jones*, L. R. 3 Ch. D. 688; *Alling v. Chatfield*, 42 Conn. 276. See *Smither v. Smither*, 9 Bush, 281; *Hoover v. Landis*, 76 Penn. St. 854; *supra*, § 429; *Haynie v. Dickens*, 68 Ill. 267; *Watrous v. Winn*, 37 Iowa, 72; *Apperson v. Bolton*, 29 Ark. 418. As to electing to take a child's part, see *Sewell v. Smith*, 54 Ga. 567. Election *in pais* is not favored, but formal election. *Bierer's Appeal*, 92 Penn. St. 265. And see 2 Jarm. Wills, 22, 35.

The will of a husband does not affect the widow's distributive "dower" interest under statute, though it may dispose of personalty against her. *Estate of Davis*, 36 Iowa, 24.

¹ *Sanford v. Sanford*, 58 N. Y. 69, applies this rule to a note taken by the husband in the names of himself and wife. But claims of survivorship in joint investments by husband and wife

are not to be favored. *Wait v. Bovee*, 35 Mich. 425. Dower and distributive rights are sometimes mutually barred by antenuptial contract. *Supra*, § 368.

A bequest may be accepted under the husband's will in express lieu of dower. *Collins v. Woods*, 63 Ill. 285. But gifts or bequests of personalty are not readily presumed to stand in lieu of dower; it is rather a devise of real estate which should be thus interpreted, though the usual rules of construction are applicable. See *Mitchell v. Word*, 60 Ga. 525; *Booth v. Stebbins*, 47 Miss. 161.

² *King v. Little*, 77 N. C. 138.

³ *Probasco v. Cook*, 39 Mich. 714. As to administration where wife dies subsequently to her husband, see *supra*, § 426.

⁴ *Vinnedge v. Shaffer*, 35 Ind. 341.

mitted before or after the second marriage; but the second husband will be held liable to the extent of the assets so converted.¹

CHAPTER IV.

SURVIVING WIFE'S RIGHTS AS TO HUSBAND'S REAL ESTATE.

§ 444. *Widow's Rights in General; Dower and Curtesy compared.* — While marriage impresses at once, at common law, the personal property of the wife with a new title, — namely, that of her husband, — the personal property of the husband remains unaffected thereby. He may buy, sell, and dispose of his own goods and chattels after marriage as before, without let or hindrance from his wife. She cannot be said to acquire a title to his general personal property, actual or potential (independently of a gift or settlement), until her coverture has terminated. Then her rights are rather those of a widow than of a wife. But as to the husband's real estate, which in old times was the only property regarded at law as really of much consequence, the rule has always been otherwise. The husband's possible life interest attached to the wife's lands whenever acquired by her; the wife's possible life-interest to the husband's lands whenever acquired by him. The husband's estate was known as curtesy, the wife's as dower. These estates had not, perhaps, the same origin: they certainly had not, in all respects, the same incidents; but both rights were known in England from a very early period, and both have remained with very little change down to a recent date in England and America.

Each estate is in the nature of a possible encumbrance, and conveyancers seek to get rid of it whenever the owner of lands wishes to pass the title in fee to another. Dower, to be sure, gave the widow only a life interest to the extent of one-third, while curtesy gave the surviving husband the full life

¹ *Witcher v. Wilson*, 47 Miss. 668.

interest. But on the other hand, dower became absolute in the widow when she outlived her husband, while curtesy, as we have seen, never attached at all unless the husband outlived his wife and was fortunate enough to have had a child by her besides. So that in these respects the rights of husband and wife, on the whole, if not equivalent, were nearly so. And as the reader may have already inferred, the general rule as to descent of real estate has been that, subject to the widow's dower, the lands of a husband descend to his own heirs; while subject to the surviving husband's curtesy, the lands of a wife descend to her own heirs; our policy being to preserve real estate in the family, so to speak, of the respective parties to a marriage, in default of issue capable of inheriting from both.¹

§ 445. *Origin and Nature of the Widow's Dower.* — Dower is to be defined as that provision which the law makes for a widow out of the lands or tenements of her husband.² In its technical sense the word relates to real estate only. It is said to be given for her support and the nurture of her children; but it applies, in fact, whenever she is the survivor, without reference to her actual circumstances as to means of support or the burden of a family. Dower extends to all estates of inheritance which the husband has held at any period of the coverture in his own right, and which any issue of hers might, if born, possibly inherit.

The word dower is of ancient origin, and seems to come from the word *dos* at the civil law, which, however, signified something quite different, and more nearly approaching what we express by the term dowry. Whether the custom of dower was introduced into England by the Saxons, or came over with the Normans, is a disputed question; but it was clearly established at or before the reign of Henry III. An early writer remarks that "tenant in dower is so much favored as that it is the common byword of the law that the law favoereth three things: life, liberty, dower."³ But these three

¹ See 1 Washb. Real Prop. 127, 147; ² Bac. Law Tracts, 331. See 1
Jenks v. Langdon, 21 Ohio St. 362. Washb. Real Prop. 147; Wright Ten.

³ Co. Litt. 30 a; 2 Bl. Com. 130; 191; Co. 2d Inst. 16; 2 Bl. Com. 129;
1 Washb. Real Prop. 146. 1 Cruise Dig. 152.

things do not seem to have kept an equal pace in the march of civilization.

There were various kinds of dower at the English law, one only of which — namely, dower at common law — is in use in this country. Dower at common law extends to one-third of the husband's real estate, and is often known as the "widow's thirds,"¹ though of course inapplicable in this sense to her distributive share of personal property. Ancient customs varied the proportion somewhat in England; thus gavelkind gave one half instead of one third, and was limited to widowhood. The other species of dower were abolished by statute in England in the time of Charles II., after having previously fallen into general disuse.²

§ 446. **The Same Subject; Quarantine.** — The Magna Charta of Henry III., which established and defined the rule of dower for future guidance, besides relieving the widow of certain burdens imposed upon heirs at the feudal law, distinctly set forth the proportion of which she should be endowed in her husband's lands, and further provided that she might tarry forty days after her husband's death in her husband's house.³ This last privilege has been since known as the widow's *quarantine*, and has been recognized by statute law in some of the United States.⁴ It was designed manifestly as something preliminary to the assignment of dower; and some statutes attach this explicit sense to the privilege.

§ 447. **To what Dower attaches; its Three Essentials.** — Dower attaches to all lands, tenements, or hereditaments, corporeal and incorporeal, of which the husband may have been seised in fee or in tail.⁵ But the husband's estate must have been one of inheritance, since the wife's estate is said to be a

¹ *Dow v. Dow*, 36 Me. 211; 1 Washb. Real Prop. 149. But, under some of our modern statutes, courts apply the term with less precision in this respect. *Padfield v. Padfield*, 78 Ill. 16; *Mitchell v. Word*, 64 Ga. 208.

² Stat. 12 Car. II. c. 24. See 1 Washb. Real Prop. 149, and 2 Bl. Com. 138, as to these ancient kinds of dower; dower *ad ostium ecclesie*, dower *ex assensu patris*, and dower *de la plus belle*.

³ 2 Bl. Com. 185.

⁴ Mass. Gen. Stats. c. 96, §§ 4, 5; *Whaley v. Whaley*, 50 Mis. 577; *Craig v. Morris*, 25 N. J. Eq. 467; *Calhoun v. Calhoun*, 58 Ga. 247; *Young v. Estes*, 59 Me. 441; *Doane v. Walker*, Ill. 1881. In Connecticut, a widow, before the assignment of dower to her, is a tenant in common with the heirs. *Wooster v. Iron Co.*, 88 Conn. 256.

⁵ 2 Bl. Com. 131; 1 Washb. Real Prop. 152.

mere continuance of the estate of her husband. Very nice questions have arisen as to what constitutes an estate of inheritance. Thus where a husband has a life estate with fee-simple in the heirs of his body, his wife cannot claim dower; nor can she in a term of years, however long.¹ Nor can she claim, even though he holds an estate for another's life, and dies before the *cestui que vie*.²

The three essentials of dower nearly correspond with those of curtesy: birth of issue, as we have said, not being requisite. They are marriage, seisin of the husband, and his death. But a careful comparison of the two estates at the old law shows some inequalities: thus, while the husband might have curtesy in the wife's trust property, the wife could not claim dower from that of her husband. This injustice grew out of an apparent necessity: it was remedied in England by the late dower act, and apparently never had a firm foothold in the United States.³

§ 448. *The Essential of Seisin in the Husband.* — The only essential of dower which calls for especial notice is the second; for we have elsewhere considered what constitutes a marriage; and as to the death of a husband leaving a widow surviving, it need only be remarked that, recognizing that legal presumption of death which arises from one's absence for seven years without being heard from, our courts sometimes allow dower where the fact of the husband's death cannot be positively established.⁴ What, then, is that seisin of the husband which entitles his widow to dower in the premises at the common law?

Briefly, then, bearing in mind that the husband's inheritance must have been his during the particular marriage, dower does not attach to a mere reversion or remainder

¹ *Burris v. Page*, 12 Mis. 358; *Goodwin v. Goodwin*, 33 Conn. 314; 1 Washb. Real Prop. 152. But see *Gorham v. Daniels*, 611, a case of dower in a husband's life estate. In Massachusetts, dower is expressly allowed in long terms of years, these being treated as real estate while fifty years remain. Mass. Gen. Sts. c. 90, § 3.

² 1 Washb. Real Prop. 153; *Park Dower*, 48; *Gillis v. Brown*, 5 Cow. 388; *Fisher v. Grimes*, 1 S. & M. Ch. 107; 2 Bl. Com. 129. Statutes sometimes provide for such cases. 1 Washb. 153.

³ 1 Washb. Real Prop. 163, and cases cited; Stat. 8 & 4 Will. IV. c. 105, *post*.

⁴ *Foulke v. Rhea*, 7 Bush, 568.

expectant upon a freehold in another so long as that freehold remains outstanding. And no more could curtesy; the freehold must terminate during marriage in order that there be a sufficient seisin in the husband to support the dower interest; in other words, his estate of inheritance must become a vested, not remain an expectant right;¹ the husband's inheritance must have been an entire one. But, on familiar principles of real-estate law, the intermediate estate being less than a freehold, as a mere lease for years, a seisin of the reversion or remainder in fee will suffice.² A merger of estates so as to unite the inheritance in the husband gives dower;³ so dower can be claimed in the estate of a tenant in common, though not, of course, in the estate of one joint-tenant who leaves another surviving him;⁴ even to exhaustion in mines owned by the husband which had been opened during his lifetime;⁵ generally in wild lands in our country, at the present day, though perhaps not at the common law;⁶ in various old-fashioned rights by way of inheritance which are mentioned in the books; and in general wherever no possibility continues interposed to prevent the husband's estate from becoming one of entire inheritance during marriage.⁷ Since equity impresses land with the fictitious character of personalty, upon consideration of the actual circumstances attending its purchase and the purpose for which it is held, it is not always easy to say whether a widow can claim dower in partnership lands.⁸ As to lands given or taken in ex-

¹ 1 Washb. Real Prop. 154, and American cases cited; 4 Kent Com. 39; Eldredge v. Forrestal, 7 Mass. 253; Apple v. Apple, 1 Head, 848.

² 1 Ld. Raym. 826; Hitchens v. Hitchens, 2 Vern. 408.

³ Miller v. Tulley, 48 Mo. 503.

⁴ Ross v. Wilson, 58 Ga. 249. In States where the principle of survivorship among joint tenants is abolished, a wife may be endowed. Weir v. Tate, 4 Ired. Eq. 264; Reed v. Kennedy, 2 Strobb. 67; 1 Washb. 157, 158; Lee v. Lindell, 22 Mo. 202. Formerly devices to prevent dower from attaching were used by English conveyancers under the rule of joint-tenancy.

⁵ Billings v. Taylor, 10 Pick. 460; Lenfers v. Henke, 73 Ill. 405; Moore v. Collins, 45 Me. 493.

⁶ See 1 Washb. Real Prop. 167, and cases cited.

⁷ 1 Washb. Real Prop. 157-167; Mayburry v. Brien, 15 Pet. 21; Reynard v. Spence, 4 Beav. 103; Park Dow. 58, 72; Billings v. Taylor, 1 Pick. 460; Stevens v. Owen, 25 Me. 94; 4 Kent Com. 40; 2 Bl. Com. 132.

⁸ Story Partn. §§ 92, 93; 1 Washb. 159, 160; Park Dow. 106; Hawley v. James, 5 Paige, 451; Smith v. Smith, 5 Ves. 189; Willet v. Brown, 65 Mo. 138; Simpson v. Leech, 86 Ill. 286.

change during her husband's lifetime, the exchange being of obviously equal interests, the rule is not quite clear, though it would seem that the widow will be put to her election between the parcels.¹

§ 449. *The Husband's Seisin in Trust Property, &c.* — Of the earlier and later rule concerning the wife's right of dower in her husband's trust property we have just spoken; and although that right is now very generally recognized in England and America, it is doubtless only coextensive with the husband's beneficial interest in the land; the rule could not possibly give the widow of a trustee dower in land held by him merely as such and for others without sanctioning robbery of the beneficiaries.² Dower in trust property, at the present day, is most frequently considered with reference to the foreclosure of mortgages; and here a court of equity applies a most liberal rule: for while the widow of the mortgagee cannot claim dower in the mortgaged premises until after foreclosure,³ the mortgagor's widow not only has every reasonable facility afforded her for discharging the encumbrances upon her husband's death whenever it may enure to her advantage to do so, but may claim dower in the equity of redemption at all events, whether the mortgage was executed before or after marriage, and upon foreclosure and sale of the premises for breach of condition have her interest protected in the distribution of the proceeds.⁴

¹ 1 Washb. 158; *Mosher v. Mosher*, 32 Me. 412; *Stevens v. Smith*, 4 J. J. Marsh. 64.

² See *Hill Trustees*, 269; *Cooper v. Whitney*, 8 Hill, 97; *Bartlett v. Gouge*, 5 B. Monr. 152; *Brooks v. Everett*, 18 Allen, 458; *Waller v. Waller*, 38 Gratt. 83.

³ 1 Washb. Real. Prop. 163. Foreclosure by the grantee or assignee of the mortgagee does not entitle the mortgagee's wife to dower. *Foster v. Dwinel*, 49 Me. 44. Nor can a mortgagee's wife claim dower under illegal foreclosure proceedings which were afterwards set aside, for the husband had no beneficial ownership. *Waller v. Waller*, 38 Gratt. 83. A wife has no dower in lands of a husband conveyed

before marriage in fraud of his creditors, even though the creditors had the conveyance set aside during coverture. *Gross v. Lange*, 70 Mo. 45. Here the husband never had a beneficial title during marriage. But *aliter*, according to the better opinion, where his conveyance before marriage can be successfully assailed as in fraud of her marital right of dower. *Supra*, § 357; 1 Washb. 174. And in general where the husband seeks fraudulently to defeat his wife's dower interest without her knowledge or assent. *Jenney v. Jenney*, 24 Vt. 324; *Nye v. Patterson*, 85 Mich. 415; *Gilson v. Hutchinson*, 120 Mass. 27.

⁴ 1 Washb. Real Prop. 164, 165; 4 Kent Com. 43, 46; *Curren v. Driver*, 33

Dower is sometimes allowed, too, out of money, the proceeds of a judicial sale or appropriation of real estate, instead of from the lands;¹ or, in the case of a mortgage foreclosure, out of the surplus accruing in the deceased mortgagor's right;² or, in various instances, out of the deceased husband's interest in lands or their proceeds, subject to some lien in favor of a vendor or other party with priorities.³

§ 450. *The Husband's Seisin; Subject continued.* — The husband's seisin, therefore, was not, even at common law, necessarily one in fact or an actual seisin; to support the wife's

Ind. 480; *Sargeant v. Fuller*, 105 Mass. 119; *Pickett v. Buckner*, 45 Miss. 228; *Hart v. Logan*, 49 Mis. 47; *Irvine v. Armistead*, 46 Ala. 368; *Peckham v. Hadwen*, 8 R. I. 160; *State Bank v. Hinton*, 21 Ohio St. 509.

As to several mortgages in some of which the wife has not released dower, and the manner of rendering decree in such foreclosure, see *Sheldon v. Patterson*, 55 Ill. 507. Dower has been allowed in case of a land patent. *Johnson v. Parcells*, 48 Mis. 549. As a general rule the law of the United States conforms in this respect to that of England under the Dower Act of 3 & 4 Wm. IV., *infra*, § 453. Where the wife never legally released dower under the mortgage, she should have dower of the premises. *Davis v. McDonald*, 42 Ga. 205. Though this may be affected by local statutes giving dower only in lands of which the husband died seised. 1 Washb. 198, 202. But where, as is now usual, she joins in the mortgage after due form, whether a mortgage back for purchase-money or not, her dower is in the equity or the surplus proceeds after a foreclosure, and no more. *Glenn v. Clark*, 53 Md. 580; *Van Doren v. Dickerson*, 33 N. J. Eq. 388; *Thompson v. Lyman*, 28 Wis. 266. Dower is not to be favored where detracting from the security which the wife had joined in giving. *Hoppin v. Hoppin*, 96 Ill. 265; *Johnson v. Van Velsor*, 48 Mich. 208. Buying an estate subject to a mortgage, and assuming its payment, confers no dower right

against the mortgagee. *Kemerer v. Bourne*, 53 Iowa, 172.

In some States the common-law rule is followed, and a wife is not dowerable of an equity of redemption or other equitable estates. In others, like Maryland, New York, Kentucky, North Carolina, Iowa, and Tennessee, the statute makes the wife dowerable if the husband held the equitable estate at his death. 1 Washb. 163, 4th ed., and cases cited; *Glenn v. Clark*, 53 Md. 580; *Abbott v. Bosworth*, 36 Ohio St. 605.

As to dower right in surplus over one mortgage, where the proceeds of the sale were not sufficient to discharge both mortgages, see English case of *Dawson v. Whitehaven*, L. R. 6 Ch. D. 218. The widow of a grantor may have dower in premises conveyed under a deed absolute on its face, but in fact a mortgage. *Turbeville v. Gibson*, 5 Heisk. 565. But not in land levied and sold under execution against the husband long before his death, though the sheriff failed to make a formal deed to the purchaser. *Rose v. Rose*, 6 Heisk. 533. Seisin is insufficient as against owner of land, in an entry under a parol contract of purchase, no purchase-money having been paid. *Latham v. McLain*, 64 Ga. 320.

¹ *Bonner v. Peterson*, 44 Ill. 258; *Re Hall's Estate*, L. R. 9 Eq. 179.

² *Bank v. Owens*, 31 Md. 320; *Rowland v. Prather*, 53 Md. 232.

³ 1 Washb. Real Prop. 165, and cases cited; *Jackman v. Nowling*, 69 Ind. 188.

dower, it was enough that he had a seisin in law, with a right to an immediate seisin in fact. His seisin might not be an indefeasible one, yet her claim was good so long as it was not actually defeated.¹ A momentary seisin is enough; as in the old case where a father and son were hanged together, and the latter, being seen to struggle longer than the former, was decided to have inherited the land from his father as he swung, so as to give to his own widow a right of dower therein.² But the seisin, though momentary, should be *bona fide* and beneficial, and not by way of conduit merely, as where one is the medium of title to a third party, or purchases with a simultaneous reconveyance to secure the purchase-money.³ Not only is the attempt of a husband to defraud his wife of her dower interest in his lands readily frustrated in the courts, but the widow now very generally finds her claim sufficiently supported by a mere right of entry in the husband.⁴ That equitable seisin which thus supports dower in trust estates corresponds substantially to the legal seisin.⁵

§ 451. **Dower how barred; how released, &c.** — Dower may be barred in various ways. The wife's elopement, followed by adultery, was made a cause of forfeiture by an old English statute; and at this day it is generally enough to add that a divorce from bonds of matrimony, procured during the lifetime of the parties, puts an end to dower right, except so far as legislation may save it. The American policy is apparently to make the wife's misconduct the ground of forfeiture under the divorce laws,⁶ but not independently of a divorce.⁷

¹ 2 Bl. Com. 130, 131; 1 Washb. Real Prop. 174, and n.; Baker v. Chase, 173-175; Atwood v. Atwood, 22 Pick. 283; Dunham v. Osborne, 1 Paige, 635; Whithead v. Mallory, 4 Cush. 138; Butler v. Cheatham, 8 Bush, 508.

² Cro. Eliz. 503; 2 Bl. Com. 132; 4 Kent Com. 89; Wheatley v. Calhoun, 12 Leigh, 264; Sutherland v. Sutherland, 69 Ill. 481.

³ See Slaughter v. Culpepper, 44 Ga. 319; Pendleton v. Pomeroy, 4 Allen, 510; Jefferson v. Jefferson, 96 Ill. 551; Moore v. Rollins, 45 Me. 493; Hinds v. Ballou, 44 N. H. 620; Fontaine v. Savings Institution, 57 Mo. 552.

⁴ Act 8 & 4 Will. IV. c. 105; 1 Washb.

⁵ See further, as to equitable estates, 2 P. Wms. 715; 4 Bro. C. C. 521; Robinson v. Miller, 2 B. Monr. 284; 1 Washb. Real Prop. 182-185.

⁶ Statute Westminster 2; 1 Washb. Real Prop. 196, 258, n.; 4 Kent Com. 53; 1 Cruise Dig. 175; 1 Bish. Mar. & Div. §§ 661, 662; 2 Bl. Com. 180; Coggeshall v. Tibbetts, 8 N. H. 41; Woodward v. Dowse, 10 C. B. n. s. 722; McAlister v. Novenger, 54 Mo. 251; 4 Am. Law Rev. 401; *post*, Part IX.

⁷ 1 Washb. 196, and cases cited.

By her own acts sometimes, in the nature of an estoppel, though very rarely ;¹ by lapse of time ; by a judicial sale ; by the defeat of her husband's defeasible title ; by her own jointure ; and, perhaps, by an exercise of the right of eminent domain on the part of government, — a wife may be debarred from receiving her dower.² But usually where the husband means to sell his land, the wife joins him in a conveyance during his lifetime, in compliance with certain statute formalities, for the purpose of releasing dower ; and if this be properly done (and in general a strict execution on her part is insisted upon by American statutes), her title becomes for ever extinguished as against the purchaser and his heirs and assigns.³

§ 452. *Assignment of Dower to the Widow.* — The right of a wife to dower becomes complete on the husband's death, leaving her surviving him. Until dower has been assigned her, the position she occupies is a peculiar one ; she has rather a right than an estate ; but the moment dower has been assigned and she enters upon the assigned premises, the freehold is vested in her by virtue and in continuance of her husband's seisin.⁴ Being entitled to a life-third in the lands, an assignment of her portion may be made accordingly ; usually by judicial proceedings.⁵ But it is at this day quite

¹ 1 Washb. 197 ; *Crenshaw v. Creek*, 52 Mo. 98.

² 1 Washb. 203-206, 217, 218 ; *Carson v. Murray*, 3 Paige, 483 ; 4 Kent Com. 70 ; *Tisdale v. Risk*, 7 Bush, 139 ; *Runnells v. Webber*, 59 Me. 488 ; *Ervin v. Brady*, 48 Mis. 560 ; *Sheldon v. Bradley*, 37 Conn. 324.

³ 1 Washb. 200, 201, and cases cited ; *Ulp v. Campbell*, 19 Penn. St. 361 ; *Curf v. Donaldson*, 53 Iowa, 291 ; *Beavers v. Baucum*, 33 Ark. 722 ; *Knox v. Brady*, 74 Ill. 476. See, *supra*, §§ 240, 269, as to wife's conveyances in general. As to effect of wife's release of dower in her husband's fraudulent conveyance, see 1 Washb. Real Prop. 202 ; *White v. Graves*, 107 Mass. 325. *Sembla* that joining in the husband's conveyance, fraudulent against his creditors, does not affect her dower right. The

effect of a wife's uniting in a conveyance with her husband is not to vest any estate in the grantee separate and distinct from that of her husband, but rather to relinquish an inchoate right in the nature of an encumbrance. *Corr v. Porter*, 33 Gratt. 278 ; *Wyman v. Fox*, 59 Me. 100 ; *Lockett v. James*, 8 Bush, 28.

⁴ As to methods and effect of assignment, see 1 Washb. Real Prop. 222-250 ; *Park Dow*, 389 ; 4 Kent Com. 61 ; *Jones v. Brewer*, 1 Pick. 314 ; *Shepardson v. Rowland*, 28 Wis. 108 ; *Wooster v. Hunts Lyman Iron Co.*, 38 Conn. 256 ; *supra*, as to quarantine, § 446.

⁵ Under a Massachusetts statute (corrective of the common law), no damages for detention of dower can be recovered by the widow prior to the demand on which the action is founded.

common for the heirs to pay the widow one third of the net rents during her natural life, where the lands are not to be sold, or else purchase her share outright for a fixed sum, computed according to the annuity tables.¹

The estate of a dowress is that of a freeholder for life, to the extent of her interest. She is answerable for waste, and entitled to her proportion of rents, profits, and reasonable estovers. As to the estate subject to which she holds her dower, she must keep down one third of the interest upon encumbrances or charges while she lives.²

§ 453. *Dower defeated in England under Modern Statutes.*—Manifestly in ancient theory the widow's dower was an independent and valuable interest. But in England, through the medium of trusts and the operation of the doctrine already noticed, the conveyancers for generations have been enabled to defeat this estate. The English Dower Act, 3 & 4 Will. IV. c. 105, while it places dower and curtesy on a like favorable footing as to trust estates, provides further that no widow shall be entitled to dower "out of any land which shall have been absolutely disposed of by her husband in his lifetime or by his will."³ Little, therefore, is left for the law to operate upon; for the husband, by his independent act, may now extinguish all dower encumbrances whatsoever.

§ 454. *Provisions in Lieu of Dower; Jointure.*—Provisions in lieu of dower are little known at the present day in England; nor were they ever of much importance in this country.⁴ We have seen, however, that antenuptial contracts executed without great formality, but in good faith, are permitted to

Whitaker v. Greer, 129 Mass. 417. See Murphy v. Borland, 92 Penn. St. 86; Flaherty v. Sutton, 49 Mo. 588. equity of redemption, see Dawson v. Whitehaven, L. R. 6 Ch. D. 218.

¹ Cheney v. Pierce, 38 Vt. 515; Clark v. Tompkins, 1 S. C. n. s. 110; McLaughlin v. McLaughlin, 22 N. J. Eq. 505. ⁴ See Wms. Real Prop. 217, notes; 1 Washb. Real Prop. 261-274; Prather v. McDowell, 8 Bush, 47; Randles v. Randles, 63 Ind. 98; Grider v. Eubanks, 12 Bush, 510. The wife is frequently

² 1 Washb. 257; Cook v. Cook, 11 Gray, 123.

³ Wms. Real Prop. 194; 1 Washb. Real Prop. 219; Macq. Hus. & Wife, 165. The English Dower Act went into effect in 1834. See *In re Hall's Estate*, L. R. 9 Eq. 179. And as to dower in

by statute permitted to take a provision under her husband's will, in lieu of dower, at her election. See Jennings v. Jennings, 21 Ohio St. 56; Richart v. Richart, 30 Iowa, 465; Kent v. Dunham, 106 Mass. 586; Kreiser's Appeal, 69 Penn. St. 194.

exclude dower; provisions thus made being respected in equity.¹

It is held in New Hampshire that a wife, owning a right of dower in her husband's lands, may properly convey it and take a promissory note of equal value payable to herself; or, owning a promissory note in her own right, secured by mortgage on the husband's estate, may sell and release her interest in such estate, and take a new note payable to herself.² And under modern equity and the married women's acts, the disposition must often be strong to protect the proceeds of a married woman's contingent or inchoate dower in her husband's lands as her separate estate, where her release was upon an intended consideration, and not as a mere favor.³ Charging or encumbering her interest thus for her husband's benefit, she does not become a surety for him, or liable upon his mortgage note.⁴ A wife, fraudulently induced by the grantee to join in conveying her husband's lands, to the loss of her inchoate rights of dower, has a right, under some recent married women's acts, to sue, during marriage, for the injury done her.⁵ If, however, a wife fails to exact special consideration for executing her release with her husband, consideration to him alone will suffice.⁶

§ 455. *Dower under Modern American Statutes.*—While the law of dower has been gradually fading out of sight in England, it attains its fuller development in this country. Curiously enough, most of the modern cases on this subject are American.⁷ Our local statutes have very generally favored the widow's rights, and unless she has joined her husband in his conveyances during his life, or statutes restrain her rights, she may usually assert the privilege at his death. But dower is found a great inconvenience in an age when

¹ *Mintier v. Mintier*, 28 Ohio St. 347; *supra*, § 363; *Hathaway v. Hathaway*, 46 Vt. 284.

² *Nims v. Bigelow*, 45 N. H. 343.

³ *Beals v. Storm*, 26 N. J. Eq. 372; *Gwathmey v. Pearce*, 74 N. C. 398; *Singree v. Welch*, 82 Ohio St. 320.

⁴ *Heburn v. Warner*, 112 Mass. 271.

⁵ *Simar v. Canaday*, 53 N. Y. 298.

⁶ See *Bailey v. Litten*, 52 Ala. 282.

As to wife's election of provision under her husband's will in lieu of dower, see *supra*, § 442.

⁷ 1 Washb. Real Prop. 267, 268;

2 Crabb Real Prop. 154, 155; *Hoffman v. Savage*, 15 Mass. 130; *Symmes v. Drew*, 21 Pick. 278; *Childs v. Smith*, 1 Md. Ch. 483; *Crockett v. Crockett*, 2 Ohio St. 180; *Park Dower*, 355;

1 Washb. Real Prop. 168.

real estate passes from hand to hand as an article of commercial traffic; and legislatures show some disposition to get rid of it altogether, together with curtesy. In New York the widow can only claim her dower out of lands of which her husband died seised;¹ and such is the rule of various other States as to equitable estates at least, like an equity of redemption.² In several States her interest is treated as something for the benefit of herself and children jointly. In others, the "thirds" are dispensed with, and a different rate is fixed. There are statutes which authorize a wife to clear wild land and reduce it to culture, though it be to cut and clear timber more freely than a dowress was permitted to. And finally, the State of Indiana has set a good example by abolishing both curtesy and dower, and substituting in behalf of husband and wife an interest in fee in one another's real estate, remaining at decease, on principles analogous to the descent and distribution of personal property of intestates; thus placing both sexes on the mutual footing of justice, and treating lands and personal estate as subject to corresponding rules.³

§ 456. **Homestead System in the United States.** — The homestead may properly be considered in connection with dower; for although this right is not strictly personal to married women, inasmuch as it exists for the benefit of both wife and children, if not for the husband besides, while he lives, it is an encumbrance upon the real estate of the husband which is generally released by the wife in connection with her dower. The homestead system is of recent origin, is peculiar to our American States, and exists for protection mainly against the husband's creditors. The policy on which it rests, by no means a new one in our legislation, is that a householder with a family shall always have a place of shelter

¹ N. Y. Stats. 1860, March 20.

² See *supra*, § 449; 1 Washb. 163, 164; *Sturdevant v. Norris*, 30 Iowa, 165.

³ 1 Ind. Sta. (1862) 291 *et seq.* And see 1 Washb. Real Prop. 219, and notes; 4 Kent Com. 86, and statutory changes in notes. See *Thornton v. Thornton*, 45 Ala. 274; *Barker v. Dayton*, 28 Wis.

367; *Hughes v. Merritt*, 67 N. C. 386, construing late statutes. The widow's statutory interest in her deceased husband's real estate is not subject to the payment of his debts, any more than a strict dower interest would have been. *Mock v. Watson*, 41 Iowa, 241. Though it would be subject to her own liabilities contracted while widow.

where legal process cannot reach him. While open to some serious objections as concerns the rights of creditors, the homestead system is to be warmly commended in respect of the encouragement it affords to agriculture, and still more as offering rewards for domestic fidelity.¹

CHAPTER V.

THE WILLS OF MARRIED WOMEN.

§ 457. **Common-Law Incapacity; Marriage a Revocation.**—Married women cannot, at the common law, make a valid will. Their incapacity in this respect results partly from the general disabilities of coverture, and partly from that common-law policy which would preserve unimpaired the husband's marital control and right of succession.

So, too, the marriage of a *feme sole* is such an entire change in her condition and relations, that it is generally held to work a revocation of her will executed before that event.² And the effect was the same, even where she survived her husband, and was thus restored to her former condition.³

¹ See 1 Washb. Real Prop. 4th ed. 342 *et seq.*, where this system is detailed. And see *Cipperley v. Rhodes*, 53 Ill. 346; *West v. Ward*, 26 Wis. 579; *Thoms v. Thoms*, 45 Miss. 263. Upon a husband's death, dower and homestead interests are frequently to be adjusted, and the inclination apparently is to consider that where the widow has a homestead interest she cannot claim dower in the same. *Merritt v. Merritt*, 97 Ill. 248. But such is not always the construction. *Showers v. Robinson*, 43 Mich. 502.

² *Forse & Hembling's Case*, 80 & 81 Eliz., 4 Co. Rep. 60, 61; *Hodsdon v. Lloyd*, 2 Bro. C. C. 584.

³ 1 Jarm. Wills, Eng. ed. 1861, 114; *Cotter v. Laver*, 2 P. Wms. 623, 624; 1 Redf. Wills, 298; *Garrett v. Dabney*, 27 Miss. 335; *Kurtz v. Saylor*, 20 Penn

St. 205. So great is the change of policy respecting a married woman's rights, that this old rule is in some States, e.g. Ohio and Illinois, reversed. See 2 Jarm. Wills, 5th Am. ed. 269, n.; *Re Tuller*, 79 Ill. 99. But, by statute, marriage alone revokes in New York, Indiana, Missouri, Pennsylvania, and perhaps other States. It is said that the rule that the marriage of a woman revoked her will made before marriage rested, for its reason, upon the fact that, by virtue of the husband's marital rights, she, becoming covert, was disabled from disposing of the property named in the will,—the will ceased to be ambulatory. *Morton v. Onion*, 45 Vt. 145. See *Re Carey's Estate*, 49 Vt. 236. Another reason, however, and a sound one as to either spouse, appears to be that by contracting so important a relation,

On the other hand, as we have seen, the marriage of a man has at the common law no such effect upon his right of testamentary disposition. He can make a will of his own property, whether married or single; nor is marriage of itself, without the birth of a child, a revocation of his will previously executed.¹

§ 458. **But Wife may bequeath with Husband's Assent.**—To the wife's testamentary incapacity there are some exceptions; and the exceptions constantly multiply. Thus by the English law she may make a valid will of personalty, with the consent of her husband. But this is upon the condition that he survives her, and does not elect, after her death, to disaffirm his consent already given. The will of a married woman, when presented for probate, is treated as a mere nullity.² But where it is alleged to have been made with the assent of the husband, the court assumes jurisdiction. Hence the wife's right in such cases is founded upon the husband's gift, or, as it is said, the waiver of his own right to administer for his own benefit.³ And if the husband die before his wife, her will is void, so far as it could have derived any validity from his consent.⁴

In order to establish a will by the husband's consent, it should be shown that the husband has consented to the particular will that his wife has made. His general assent that she may make a will is not deemed sufficient.⁵ But his consent to a particular will may be inferred from circumstances;

and entering, so to speak, into a new family, the former testator may be assumed to have adopted quite different views as to the transmission of his or her property upon death.

In Connecticut and some other States the equal and just legislative rule obtains, that the marriage of any testator shall operate a revocation. 3 Jarm. Wills, 5th Am. ed. 783, n.

So, by the recent English statute, wills are held to be absolutely revoked by the subsequent marriage of the testator, whether made by a man or woman, unless such will were made in execution of certain specified powers; and it is further provided that no will

shall be revoked by any presumption of intention on the ground of alteration of circumstances. 1 Vict. c. 26, § 8; 1 Redf. Wills, 297. Thus is a mass of legal learning as to birth of issue swept away, and an opening made towards the testamentary equality of the sexes.

¹ *Supra*, § 442.

² *Tucker v. Inman*, 4 M. & G. 1049; *Ex parte Fane*, 16 Sim. 406.

³ 1 Wms. Ex'rs, 45, 49; 1 Redf. Wills, 25; *Stevens v. Bagwell*, 15 Ves. 156.

⁴ 1 Redf. Wills, 25.

⁵ 1 Wms. Ex'rs, 44; *Rex v. Bettsworth*, 2 Stra. 391.

and if after his wife's death he acts upon the will, or once agrees to it, he is not considered at liberty to retract his assent afterwards, and oppose the probate.¹ Such acts as expressing gratification at his wife's selection of an executor, or recommending him to particular places to procure suitable preparations for the burial, may constitute a conclusive presumption of assent after the wife's death; at least, if the executor has been thereby induced to act under the instrument.² And recently it has been decided that he cannot withdraw his assent before probate, after giving the sole legatee a written memorandum containing his sanction of the will, in order to borrow it for an alleged particular purpose.³

§ 459. **Same Subject; American Rule.** — The rule is general in this country that the husband may allow his wife to make a valid will of her personal estate, and that his assent cannot be revoked after probate of the will.⁴ His general assent to make a will does not suffice, but must attach to the particular disposition.⁵ But such assent may be given before the wife's death, as by contract, or after her death,⁶ and the instrument must be duly presented for probate.⁷

§ 460. **Wife's Disposition as Executrix.** — Another class of so-called exceptions to the wife's incapacity is, when she takes property in character of executrix, and her will is confined to matters and things which she takes in that character; in which case she may make a will without the husband's assent, and the ecclesiastical or corresponding court assumes jurisdiction.⁸ But if the wife had before marriage reduced to

¹ 1 Wms. Ex'rs, 44; *Brook v. Turner*, 2 Mod. 170; *Maas v. Sheffield*, 10 Jur. 417; 1 Rob. Ecc. 364.

² *Ib.*; 1 Redf. Wills, 24.

³ *Maas v. Sheffield*, 10 Jur. 417; 1 Rob. Ecc. 364.

⁴ *Cutter v. Butler*, 5 Fost. 343; *Fisher v. Kimball*, 17 Vt. 323; *Emery v. Neighbour*, 2 Halst. 142; *George v. Bussing*, 15 B. Monr. 558; *Wagner v. Ellis*, 7 Penn. St. 413; *Lee v. Bennett*, 31 Miss. 119; *Newlin v. Freeman*, 1 Ired. Law, 514. As to the method of expressing assent, see *Grimke v. Grimke*, 1 Desaus. 386; *Cutter v. But-*

ler, 5 Fost. 343; 1 Redf. Wills, 29; *Kurtz v. Saylor*, 20 Penn. St. 205.

⁵ *Kurtz v. Saylor*, 20 Penn. St. 205.

⁶ *Wagner v. Ellis*, 7 Penn. St. 413. In *Van Winkle v. Schoonmaker*, 15 N. J. Ch. 384, it is asserted that the husband may withdraw his assent at any time before probate. Cf. *Cutter v. Butler*, 5 Fost. 343.

Assent of the husband is now dispensed with, wholly or partially, in various States. *Burroughs v. Nutting*, 105 Mass. 223; *post*, § 464.

⁷ *Lee v. Bennett*, 31 Miss. 119.

⁸ *Tucker v. Inman*, 4 M. & G. 1076.

possession personal chattels, to which she was entitled as executrix, the right of the husband attaches, and the wife cannot dispose of them by will.¹ Since this exception does not concern property to which the wife takes a beneficial title, it can hardly be called an exception at all.

§ 461. *Wife's Will of Separate Property; English Rule.* — A third class of exceptions, recognized in England, is where personal property is given or settled, or is agreed to be given or settled to the wife's separate use. In such a case the wife may dispose of such property to the full extent of her interest, although no particular form is prescribed in the instrument creating the trust. This follows as an incident to the right of beneficial enjoyment. It makes her right of disposition complete.² "I have always taken this ground," says Lord Thurlow, of this class of cases, "that personal property, the moment it can be enjoyed, must be enjoyed with all its incidents."³ And as to the wife's separate estate, savings out of allowance or assets or accumulations in the hands of her trustees may be bequeathed by will as well as the capital; for this, too, is separate estate.⁴ But it should be borne in mind that as to her right of disposition, a married woman is a *feme sole sub modo* only, and is limited by the terms of the gift or settlement from which her estate is derived.⁵

There is no reason for distinguishing between real and personal estate settled to the wife's separate use; the exception ought to embrace both kinds of property.⁶ But the English cases for some time manifested a doubt on this point, and the testamentary *jus disponendi* was thought not so clear in the case of separate real estate as of separate personalty.⁷ The recent case of *Taylor v. Mead* would appear to set this

¹ *Scammell v. Wilkinson*, 2 East, 552; 1 Wms. Ex'rs, 44; 1 Redf. Wills, 23; *Hodsdon v. Lloyd*, 2 Bro. C. C. 534.

² *Fettiplace v. Gorges*, 1 Ves. Jr. 46; Lord Eldon, in *Rich v. Cockell*, 9 Ves. 375; 1 Redf. Wills, 23; 1 Wms. Ex'rs, 48, and English cases cited.

³ *Fettiplace v. Gorges*, 1 Ves. Jr. 46.

⁴ *Brooke v. Brooke*, 25 Beav. 342;

1 Jarm. 34, 35; 1 Redf. Wills, 24. But as to pin-money, see *Barrack v. McCulloch*, 8 Kay & Johns. 114, and *supra*, §§ 291, 292.

⁵ See *supra*, Part VII.

⁶ 1 Jarm. Wills, ed. 1861, 34, 35; per Lord Lyndhurst, *Baggett v. Meux*, 1 Ph. 623.

⁷ *Harris v. Mott*, 14 Beav. 169; *Churchill v. Dibben*, 9 Sim. 447, n.

doubt at rest.¹ In this case the wife had lands conveyed in trust to her separate use, with a power given her to appoint it by any instrument in writing, "to be by her signed, sealed, and delivered" after a certain manner, the formalities prescribed being greater than the Statute of Wills required for testamentary dispositions. The property was limited over to others in default of such appointment. She made an instrument in writing, which conformed to the Statute of Wills, but which, not being under seal, was not in accordance with the power given her. It was decided that the instrument was defective as the execution of a power of appointment; but that it was a valid devise, such as she had the right to make, of estate settled to her sole and separate use.²

§ 462. *Wife's Will where Husband is Dead at Law.*—A married woman's right to make a will is further recognized in cases where her husband is dead at the law. As where he has been banished for life.³ Or is transported for life.⁴ Or is an alien enemy.⁵ For in such cases she is no longer regarded as under the disabilities of coverture. And some writers have thought that while a husband's marital rights are suspended, as by his temporary banishment, his wife ought to be able to make a valid will of property acquired by her in the mean time.⁶

§ 463. *Modern English Statutes of Wills.*—Married women were expressly excepted from the Statute of Wills, 34 & 35 Hen. VIII. c. 5, though no new disability was thereby created, since they had been regarded as incapable of executing a will at a much earlier date. The present English Statute of Wills, 1 Vict. c. 26, § 8, provides that "no will made by any married woman shall be valid, except such will as might have been made by a married woman before the passage of this

¹ 10 Jur. x. s. 127, overruling *Buckell v. Blenthorne*, 5 Hare, 181.

² *Ib.* And the Vice-Chancellor has decided that her devise is equally valid, though the property was given to her separate use, without the intervention of trustees. *Hall v. Waterhouse*, 11 Jur. x. s. 361.

³ *Countess of Portland v. Progers*,

2 Vern. 104; *Compton v. Collinson*, 2 Bro. C. C. 377.

⁴ *Newsome v. Bowyer*, 3 P. Wms. 87; *Goods of Martin*, 15 Jur. 686; *Atlee v. Hook*, 28 L. J. Ch. 776.

⁵ *Deerly v. Mazarine*, 1 Salk. 116.

⁶ 1 Jarm. Wills, ed. 1861, 36; *Ex parte Franks*, 1 Moore & Sc. 11. But see *Coombs v. Queen's Proctor*, 16 Jur. 820.

act." But the exceptions have so multiplied upon the prohibition of late years as to constitute of themselves a new rule.

§ 464. *Wife's Will under late American Statutes.* — In this country the great revolution which has been effected in the property rights of married women leaves its traces upon their testamentary privileges. The principles stated or indicated in the married women's acts, though not uniformly expressed in clear and unambiguous language, is that the wife may devise or bequeath, by her sole will, whatever separate property the statutes secure to her; and that such will is valid without the joinder or assent of her husband.¹ Property which was not really the wife's in her own right, but the husband's, at the time of her death, cannot, of course, be the subject of her devise or bequest;² nor that which vests at once in him upon her death by the rule of survivorship.³ But the husband's assent may make a married woman's will valid and conclusive against him and his creditors.⁴ The latest legislation tends to confer independent testamentary powers upon the wife without qualification of terms as to her property, and apart from her husband's concurrence.⁵

¹ Such express provisions are to be found in the laws of Maine, New Hampshire, Massachusetts, Rhode Island, New York, Pennsylvania, Ohio, Indiana, and Wisconsin; and since 1878 in almost every other State, many local acts on this subject bearing that or a more recent date. See 3 Jarm. Wills, 5th Am. ed. 752, n.

The language of these statutes is sometimes restricted to the wife's "separate" property; in other States the word "separate" is not employed. Some States employ the word "devise," and omit the word "bequeath," thus suggesting the inquiry whether the legislature meant that the wife could dispose of her lands, but not her chattels. Certain rights of the husband are found to be expressly reserved in many of these acts; and in Massachusetts it is provided that the wife cannot deprive her husband of more than one half her personal estate without his consent in writing. See Mc-

Bride's Estate, 81 Penn. St. 303; *Beals v. Storm*, 26 N. J. Eq. 372. The Kansas statute applies this qualification to both husband and wife. Some legislatures have manifested special opposition to the husband's influence over the wife's disposition. The laws of Pennsylvania, for instance, expressly forbid him from executing the will as a witness. And it would appear that under the New Hampshire statute the husband cannot receive any benefit under his wife's devise of her separate real estate.

The right to make a will is determined by the law existing when the will was made rather than the law at the time of the wife's death. *Kurtz v. Saylor*, 20 Penn. St. 205.

² *Alsop v. McArthur*, 76 Ill. 20; *Vreeland v. Ryno*, 26 N. J. Eq. 160.

³ *Stroud v. Connelly*, 33 Gratt. 217.

⁴ *Beals v. Storm*, 26 N. J. Eq. 372.

⁵ 3 Jarm. Wills, 5th Am. ed. 752, n., for the latest legislation in detail.

In some States the capacity of married women to execute a valid will seems to have been conferred by implication. The statutes of Vermont give them the power to devise their real estate by last will and testament; and since equity has given so liberal a scope to their powers over separate property, it would appear that they may make a valid bequest of equitable separate chattels likewise, without the concurrence of their husbands, and as part of the *jus disponendi*.¹ But in States which draw the doctrine of separate use from their own local legislation, a more stringent rule might be enforced on a husband's behalf.² The whole subject has as yet received little attention in the courts, though much from the legislature.³

But there are already some decisions sustaining the wife's right to devise or dispose by her will, duly executed, of real estate held to her sole and separate use.⁴ And she may even, in certain States, cut off her husband's right of curtesy by observing the statute formalities of execution; in Massachusetts and other States, for instance, by a will executed with her husband's assent;⁵ in Illinois without such assent.⁶ And

¹ See *Caldwell v. Renfrew*, 28 Vt. 218; *Holmes v. Holmes*, 27 Vt. 765.

² See *Compton v. Pierson*, 28 N. J. Eq. 229.

³ In Virginia, and the Southern Atlantic States generally, as well as Alabama, the doctrine of the wife's testamentary capacity, until very recently, seemed to be founded upon the earlier English cases. But in these and some other States which borrow largely from the chancery jurisprudence of England, perhaps the wife would have been allowed to devise and bequeath property duly settled to her separate use, or execute a power should such cases occur. See *Burton v. Holley*, 18 Ala. 408; *Porcher v. Daniel*, 18 Rich. 849; *Michael v. Baker*, 12 Md. 158. It has been perceived that this right of testamentary disposition, as incidental to the wife's beneficial enjoyment of her separate property, has been but gradually conceded in England, and that the beneficial rule for a long time was supposed to apply to her personal estate simply. *Supra*, § 461.

⁴ *Albrecht v. Pell*, 18 N. Y. Supr. 127; *Emmert v. Hays*, 89 Ill. 1.

⁵ *Sanborn v. Batchelder*, 51 N. H. 426; *Silsby v. Bullock*, 10 Allen, 94; *McBride's Estate*, 81 Penn. St. 303.

⁶ *Pool v. Blakie*, 58 Ill. 495. And see *Cavanaugh v. Ainchbacher*, 36 Ga. 500; *Stewart v. Ross*, 50 Miss. 776.

There are various States where, under statutes not the most recent, the wife's will of property settled to her separate use has been allowed to operate by way of appointment. *Buchanan v. Turner*, 26 Md. 1; *Porcher v. Daniel*, 13 Rich. 849. And of course her will made by permission of the husband, where the same is duly admitted to probate. *Supra*, § 459. In Kentucky, while a married women's will is to be restricted in operation to such estate as she is authorized by law to dispose of by will, and the conclusiveness of a probate judgment must be regulated accordingly, there is a liberal disposition manifested to treat land belonging

in respect to curtesy and bequests in lieu thereof, the husband may, in some States, be put to his election, as the widow has been in respect of her dower.¹

§ 465. *Wife's Will under the Civil Law.* — It is well understood that, by the Roman civil law, a married woman possessed the same testamentary capacity in all respects as a *feme sole*.² And such is the law in France, Holland, Spain, and the European countries generally.³ In Scotland the wife is permitted to bequeath her share of the common goods, even without the husband's assent.⁴ The early policy of England as to wills seems in truth peculiar to that country. For Voet and other publicists have declared that, although the wife should not be allowed to make a contract without the consent of her husband, yet she ought to be permitted to make a will, because it does not take effect until the marital authority has ceased.⁵ And the obvious tendency at present

to a married woman who lives apart from her husband, as so far her separate estate that she may dispose of it by her will. *Mitchell v. Holder*, 8 Bush, 362; *Hiram v. Griffin*, 8 Bush, 262.

Independently of late statutes conferring a special power, the older States agree that a married woman cannot devise lands not held in her sole right. *Osgood v. Breed*, 12 Mass. 525; *Taber v. Packwood*, 2 Day, 63; *West v. West*, 10 S. & R. 446; *Marston v. Norton*, 5 N. H. 205; *Newlin v. Freeman*, 1 Ired. Law, 514. But the Ohio courts, many years ago, decided that under its own statutes, giving "every male person aged twenty-one years or upward, and every female aged eighteen years or upward," the power to devise property, a married woman could make a valid will to pass her real estate. *Allen v. Little*, 5 Ohio, 65. This was a case of a woman living apart from her husband. In New York a married woman might formerly make a valid will under the written authority of her husband; but the right was afterwards taken away; for, by the Revised Statutes, married women were expressly excepted from the provision conferring general testamentary power. *Moeh-*

ring v. Thayer, 1 Barb. Ch. 264; *Wadhaus v. Am. Home Missionary Society*, 12 N. Y. 415. See *White v. Wager*, 25 N. Y. 328.

¹ *Clarke's Appeal*, 79 Penn. St. 376; *supra*, § 442; *Huston v. Cone*, 24 Ohio St. 11.

² 2 Bl. Com. 497; 1 Redf. Wills, 22.

³ 4 Burge Col. & For. Laws, 826.

⁴ *Ib.* 328.

⁵ Voet, Sande, and Rodenb., cited 4 Burge Col. & For. Laws, 826. We may understand, therefore, why the Louisiana Code permits the wife to make her testament without the authority of her husband. La. Code, art. 132. And in other Southwestern States, under the community system, the wife's right of testamentary disposition is likewise to be found. In Mississippi this right has been long favored; nor is it abridged by construction of the married women's acts. *Lee v. Bennett*, 81 Miss. 119. In California the statute gives the wife power to dispose of all her separate estate without the concurrence of her husband, but her will must be attested, witnessed, and proven after the ordinary manner of wills. It cannot be said in any of these States that the doctrine of the wife's testamentary

in England and the United States is to emancipate the wife from ancient disabilities in that respect; notwithstanding which the restriction seems a wise one, that neither spouse shall utterly deprive the other of the usual and legal distributive rights at a capricious discretion.¹

§ 466. **Re-Execution of Will after Coverture; After-acquired Property, &c.** — Under the present English statute, 1 Vict. c. 28, § 8, the will of a married woman is not rendered void, if executed during coverture, by sole reason of her surviving her husband. There must be a confirmation or republication of the will, however, after coverture ceases, that it may fully operate; and republication must be in the particular mode pointed out by the statute, and not by parol.² Hence a mere signature by herself, and other parties as witnesses, the testatrix saying nothing about the reason of her signing, and making no request for the others to sign as witnesses, is held not to amount to a republication of the will.³

As to expectant property not vesting in the wife until after her husband's death, she ought to re-execute her will upon his death or make a new one.⁴ So in other respects as affecting property afterwards acquired by her under his will. For as to such property she was intestable during coverture. Death, too, would appear to revoke a husband's assent to his wife's will.⁵

§ 467. **Bequests to the Husband; his Marital Control.** — There can be little doubt of the reluctance with which courts of

capacity was borrowed entirely from the English common law, or underwent corresponding modifications, though the final results at this day are found to be quite similar; and statutes enacted since 1870 conform to the general American rule.

¹ The argument which applies in favor of a widow's election to decline the provisions of her husband's will should *vice versa* be available to a husband. Either husband or wife may prove either too generous or too niggardly if left to an unfettered discretion, such are the perils of a life companionship; and this the new statutes will probably in time demonstrate.

² 1 Redf. Wills, 377; Dickinson v. Swatman, 6 Jur. n. s. 831; Goods of Graham, L. R. 2 P. & D. 385; Willock v. Noble, L. R. 7 H. L. 580.

³ Dunn v. Dunn, L. R. 1 P. & D. 277.

⁴ Willock v. Noble, L. R. 7 H. L. 580; Scammell v. Wilkinson, 2 East, 556.

⁵ *Ib.* L. R. 8 Ch. 778. Cf. Bishop v. Wall, 3 Ch. D. 194, as to re-execution of a testamentary appointment in exercise of a power.

Re-execution was not deemed necessary in the Virginia case of Thorndike v. Reynolds, 22 Gratt. 21.

equity sustain devises from the wife to her husband. And there are cases to the effect that the husband cannot become the gainer, or have his marital rights extended, by his wife's testamentary disposition of her lands. But they generally turn rather upon statutory construction than principle.¹ In New York the married women's act of 1849 gave the wife power "to convey and devise real and personal property," "as if she were unmarried," and it was held that, notwithstanding these words, a deed executed by a wife, in contemplation of death, to her husband, in good faith and voluntarily, was wholly ineffectual.²

Wills of married women unduly obtained, through the marital influence and authority of their husbands, are of course invalid, though the case should fall within one of the exceptions to her general incapacity.³ So if a wife, having power to dispose of property by her will, makes her will, and afterwards destroys it by the compulsion of her husband, it may be established afterwards, on due proof of his misconduct, and of its contents and execution.⁴

But in the analogous instance of the wife's appointment to her husband, it has been held that the circumstances that the deed had been prepared by her husband's solicitor, that it had not been read over at the time of the execution, and the evidence of one of the attesting witnesses that she was agitated and distressed at the time of the execution, and signed it in a reluctant manner, will not be sufficient to invalidate the deed.⁵ The wife's will or appointment in favor of her husband may be revoked as in other cases.⁶

A married woman, being desirous of making a disposition of her real estate, to take effect after her decease, united with her husband in the execution of a deed of the same to a trustee, authorizing him to make a sale thereof, and out of the

¹ *White v. Wager*, 25 N. Y. 328; *Morse v. Thompson*, 4 Cush. 562; *Wakefield v. Phelps*, 37 N. H. 295; *Hood v. Archer*, 1 McCord, 225.

² This was no will. *White v. Wager*, 25 N. Y. 328. But see *Caldwell v. Renfrew*, 33 Vt. 213. A wife may bequeath to her husband her choses. *Burton v. Holly*, 18 Ala. 408.

³ *Marsh v. Tyrrell*, 2 Hagg. 84; 1 Wms. Ex'rs, 47.

⁴ 1 Wms. Ex'rs, 47.

⁵ *Nedby v. Nedby*, 11 E. L. & Eq. 106. See *Noble v. Enos*, 19 Ind. 72.

⁶ *Goods of Eustace*, L. R. 3 P. & D. 183.

proceeds to pay certain sums to particular individuals, and the remainder to her legal representatives. The husband received the deed after its execution, upon his express promise to deliver it to the grantee, at his wife's decease, if that should occur before his own. Upon her death before the husband, a court of equity decreed the delivery of the deed to the grantee, on the ground that the title to such estate had vested in him.¹

§ 468. **Mutual Wills of Husband and Wife.** — It is held in Pennsylvania, that where husband and wife had wills prepared giving their property to each other, but each by mistake signed the other's will, and the husband afterwards died, the legislature could pass no subsequent law to reform his will; inasmuch as the right of his heirs became vested on his death as an intestate.² Joint or mutual wills by husband and wife are permitted in Texas.³

§ 469. **Wife's Gift Causa Mortis.** — The same principles which regulate the wife's testamentary disposition of her personal chattels regulate her gift *causa mortis* likewise.⁴ Therefore it is held that the wife's gift of any of her property during her last illness, and in expectation of death, is, like her will, valid only by the assent of her husband.⁵ Where the wife held notes to her separate use, it was decided in Vermont that she might make them the subject of a *donatio causa mortis* to her husband as trustee for other persons, and thereby vest in him a good legal title as against her administrator. "In this view alone," added the court, "it seems to be needless to discuss whether the husband could be a donee *causa mortis* of the wife; and yet on principle it is quite difficult to assign a cogent or plausible reason why he might not be."⁶ But of course the husband may set up his antenuptial contract with his wife in reference to certain property, so as to prevent her *donatio causa mortis* to others from taking effect to his prejudice.⁷

§ 470. **Wife's Execution of a Testamentary Power.** — Finally, it may be observed that, both in England and America, a

¹ Woodward v. Camp, 23 Conn. 61, as to the donation of wife's separate property.

² Alter's Appeal, 67 Penn. St. 341.

⁵ Jones v. Brown, 34 N. H. 439.

³ Wyche v. Clapp, 43 Tex. 543.

⁶ Caldwell v. Renfrew, 33 Vt. 213.

⁴ See Kilby v. Godwin, 2 Del. Ch.

⁷ Lawrence v. Bartlett, 2 Allen, 36.

married woman may make a special testamentary disposition of real or personal estate under a power, even where her general testamentary capacity is by law denied or restricted. There are many decisions found to this effect.¹ A wife may have power to appoint certain property by will and not by deed.² And in some cases, particularly those involving property rights in the wife's lands, the courts seem to have been misled by the similarity between separate estates and estates with a power of appointment given to the wife; and therefore to have applied the terms "devise," "will," and "appointment," somewhat indiscriminately. Revocation and the other incidents of ordinary wills attend, *pro tanto*, the wife's testamentary disposition under a power,³ which, of course, may be so extensively conferred under the trust as to embrace a considerable property, and perhaps all, in fact, of her separate property.

¹ 4 Kent Com. 506; *Heath v. Withington*, 6 Cush. 497; *West v. West*, 10 S. & R. 446; 1 Redf. Wills, 28, and cases cited; 2 Perry Trusts, § 668; *Dunn's Appeal*, 85 Penn. St. 94; *Dominick v. Michael*, 4 Sandf. 374; *Hughes v. Wells*, 13 E. L. & Eq. 389; *Shattock v. Shattock*, L. R. 2 Eq. 182; *Rogers v. Hinton*, 1 Phill. (N. C.) Eq. 101. In cases of doubt a limited probate of the instrument may be granted. *Raylon v. Tongue*, L. R. 1 P. & D. 158; *Goods of Richards*, L. R. 1 P. & D. 156. And see *Trappes v. Meredith*, L. R. 7 Ch. 248; *Goods of Graham*, L. R. 2 P. & D. 385. Where a will is only an appointment under a settlement, the trustees named do not act, strictly speaking, as

executors. *Goods of Fraser*, L. R. 2 P. & D. 183.

² See *Re Harvey*, 28 W. R. 73, as to subjecting appointed funds as assets for the wife's debts.

³ *Goods of Eustace*, L. R. 3 P. & D. 183. But re-execution after the husband's death is not strictly required where a power of appointment is exercised, as in the case of a will. *Bishop v. Wall*, 3 Ch. D. 194. A wife's power to make testamentary disposition should be clearly expressed or manifested. *Harris v. Harbeson*, 9 Bush, 397. The same formalities are not necessarily requisite in executing a power, as in disposing of separate property. *Schley v. McCeney*, 36 Md. 206.

PART IX.

SEPARATION AND DISSOLUTION BY DIVORCE.

CHAPTER I.

SEPARATION AND ITS CONSEQUENCES.

§ 471. *Separation in General.* — Separation is that anomalous condition of a married pair which involves a cessation of domestic intercourse, while the impediments of marriage continue. Either from choice or necessity, as the case may be, they throw aside the strong safeguards of a home and mutual companionship; they forfeit their most solemn obligations to protect, love, and cherish through life; they continue united in form and divided in fact. The spirit of the contract, all that dignifies and ennobles it, is gone; but the letter remains. Both parties submit, in some degree, at least, to the degradation of public scandal; they are cast loose upon the world without the right to love and be loved again; the thought of kindling fresh flames at the altar of domestic happiness is criminal; and deprived of the comfort and support of one another, finding in society at best but timid sympathy and consolation, the moral character must be strong, and doubly so must be that of the wife, that each may buffet with success the tide which bears onward to destruction. Such a state of things no public policy can safely favor; but the law sometimes permits it, if for no other reason than that an adequate remedy is wanting to check or to prevent the evil; and hence it may be thought more expedient for the courts to enforce such mutual contracts of the unhappy pair as mitigate

their troubles, than to dabble in a domestic quarrel and try to compel unwilling companionships.

This we conceive to be the rightful position of the English and American equity courts whenever they see fit to enforce separation agreements. Some, to be sure, are disposed to carry the argument further. Thus, recent English writers of much repute refer to the fact that divorces from bed and board are often granted in that country, and hence conclude that it is reasonable for the married parties themselves to compromise litigation, save court fees, and avoid public notoriety, and therefore to agree to live apart, just as though the court had entered a decree for that purpose.¹ But this argument proves too much; for if marriage and divorce are matters for private compromise, like ordinary contracts, why should not the discontented pair, upon just cause, agree to unloose the yoke altogether? Why should they not sometimes obtain divorce from the bonds of matrimony by collusion and default, and thus take the readiest means of avoiding scandalous and expensive suits? One shrinks from such conclusions. In fact, divorce laws do not belong to the parties themselves, but to the public; government guards the sanctity of marriage, just as it demands the duty of allegiance; only that perhaps its policy cannot be enforced in the one case as well as the other. It is because marriage is not on the footing of ordinary contracts, that husband and wife cannot, on principle, compromise, arbitrate, or modify their relationship at pleasure. Furthermore, the above argument would seem to suggest that where a complete divorce, instead of divorce from bed and board, is attainable, deeds of separation would not hold good; nor, again, where parties separate for causes which do not even justify divorce from bed and board; neither of which positions is sustained by the actual decisions.

§ 472. *Separation Deeds; their History in England.* — Lord Eldon was of the opinion that a settlement by way of separate maintenance, on a voluntary separation of husband and wife, was against the policy of the law and void. The

¹ *Macq. Hus. & Wife*, 324 *et seq.* See also *Jacob n. to Roper Hus. & Wife*, 277; *Peachey Mar. Settl.* 647.

ground of his opinion was that such settlements, creating a separate maintenance by voluntary agreement between husband and wife, were in their consequences destructive to the indissoluble nature and the sanctity of the marriage contract; and he considered the question to be the gravest and most momentous to the public interest that could fall under discussion in a court of justice.¹ But in England final and complete dissolution of marriage was, until quite recently, attainable only by act of Parliament. And this method of procedure was found so difficult, expensive, and uncertain, that parties who could not live peaceably together were led to consider some lesser means of mitigating their misfortune. To be sure the ecclesiastical courts awarded sentences of divorce from bed and board; but these merely discharged the parties from the duty of cohabitation, permitting them to come together afterwards if they should so choose; and therefore, as a writer observes, these sentences "did not often, it must be owned, repay the pains bestowed in obtaining them."² The English ecclesiastical courts steadily refused, moreover, to recognize separation deeds.³ Such a policy seems, however, to have turned husband and wife to their own devices for effecting the same result, with less delay and annoyance, and in order to adjust more completely those property arrangements which never could be forgotten in their misery. Deeds of settlement, trusts, and the intervention of the equity courts, readily furnished a plan of operations; and the ubiquitous conveyancer appeared once more upon the stage to open the way, through subtle refinements, to freedom for discontented couples, and emolument for himself.

After a prolonged struggle, and in spite of public policy, it is therefore fully established at length in England, as a doctrine of equity, that deeds of separation may and must, if properly framed, be carried into execution by the courts.⁴

¹ *St. John v. St. John*, 11 Ves. 530. L. J. Eq. 425; *Peachey Mar. Settl.* See *Mortimer v. Mortimer*, 2 Hag. 620; *H. v. W.*, 3 Kay & Johns. 386, 387. Consist. Rep. 818; *Legard v. Johnson*, 3 Ves. 352; *Mercein v. People*, 25 Wend. 77.

² 1 Bish. Mar. & Div. 5th ed. § 634; *Mortimer v. Mortimer*, 2 Hag. Con. 310; *Smith v. Smith*, 4 Hag. Ec. 609.

³ *Macq. Hus. & Wife*, 326. See *Hope v. Hope*, 3 Jur. n. s. 456; s. c. 26

⁴ *Wilson v. Wilson*, 1 Ho. Lords. Cas. 538; 5 Ho. Lords Cas. 59; *Peachey*

They may be enforced in the common-law courts indirectly through the medium of covenants which are entered into between the husband and trustees; and in equity specific performance will be decreed where the stipulations are not contrary to law nor in contravention of public policy.¹ An agreement between husband and wife to live apart is perhaps void as against public policy; but the husband's covenant with a third party may be valid and binding, although it originates in this unauthorized state of separation and relates directly to it.²

It may seem strange that such an auxiliary agreement should be enforced, while the principal agreement is held contrary to the spirit and policy of the law. Lord Eldon, who strongly opposed the whole doctrine on principle, said that if the question were *res integra*, untouched by *dictum* or decision, he would not have permitted such a covenant to be the foundation of a suit in equity.³ Sir William Grant appears to have been the first to call attention to the inconsistency of the courts in this respect; and his remark has come down through the later judges.⁴ Lord Rosslyn, however, hit upon the explanation that an agreement for a separate provision between the husband and wife alone is void, merely from the general incapacity of the wife to contract:⁵ an explanation which, we submit, is quite unsatisfactory. The true reason for the anomalous distinction appears to be simply this: that contracts for separation are in general void as against public policy, but that the courts saw fit to let in exceptions so far as to enforce fair covenants.

§ 473. *Separation Deeds in the United States.*—Deeds of separation were never very common in the United States. And there are at least three very good reasons why they should be at this day less encouraged than in England. The

Mar. Settl. 620, and cases cited; Macq. Hus. & Wife, 329.

¹ Vansittart v. Vansittart, 2 De Gex & Jones, 249; *post*, § 479.

² Worrall v. Jacob, 8 Mer. 255; Peachey Mar. Settl. 621; Sanders v. Rodney, 16 Beav. 211; Warrender v. Warrender, 2 Cl. & Fin. 488.

³ Westmeath v. Westmeath, Jac. 126; 2 Kent Com. 176.

⁴ See Jones v. Waite, 5 Bing. 361; Frampton v. Frampton, 4 Beav. 298.

⁵ Legard v. Johnson, 3 Ves. Jr. 352. See 2 Bright Hus. & Wife, 306, n. by Jacob.

first is that our legislation strongly favors the separate control of married women as to their own acquisitions, without the intervention of trustees and formal deeds of settlement, thus dispensing with the necessity of intricate property arrangements. The second is that equity, ecclesiastical, and common-law functions are usually blended in the same courts of final appeal, so that a State is at liberty to adopt the precedents of the ecclesiastical rather than the modern equity tribunals of England for its guidance; while an American court, on the other hand, could not admit clearly the right of parties to declare terms of private separation, without bringing confusion and uncertainty upon its own divorce and matrimonial jurisdiction. The third is that sentences of divorce have been procured in most of the United States with great ease, moderate expense, and little publicity.

Early in this century, Chancellor Kent summed up authorities which showed that a private separation was an illegal contract, in these emphatic words: "Nothing can be clearer or more sound than this conjugal doctrine."¹ Contrary to what until quite lately was the rule in England, many of our States have never directly sanctioned separation deeds at all. And a recent North Carolina case distinctly maintains what ought to and may yet become the pronounced American doctrine: that separation deeds are void as against law and public policy.²

Nevertheless there are individual American cases, and numerous ones, where separation deeds have been recognized so far as to permit and sometimes to require parties to perform such marital duties as were incumbent upon them, notwithstanding the fact of separation.³ And the text-writer must

¹ 2 Kent Com. 177 n.

² *Collins v. Collins*, 1 Phill. N. C. Eq. 153.

³ 1 Bish. Mar. & Div. § 639 *et seq.*; *Read v. Beazley*, 1 Blackf. 97; *Bettle v. Wilson*, 1 Ohio, 257; *Goodrich v. Bryant*, 4 Sneed, 325; *McCubbin v. Patterson*, 16 Md. 179; *Beach v. Beach*, 2 Hill, 260; *Griffin v. Banks*, 37 N. Y. 621; *Joyce v. McAvoy*, 31 Cal. 273; *Walker v. Stringfellow*, 30 Tex. 570;

Hitner's Appeal, 54 Penn. St. 110; *Loud v. Loud*, 4 Bush, 453; *Dutton v. Dutton*, 30 Ind. 452; *Robertson v. Robertson*, 25 Iowa, 350; *McKee v. Reynolds*, 26 Iowa, 578; *Magee v. Magee*, 67 Barb. 487; *Walker v. Beal*, 3 Cliff. 155; *Dupre v. Rein*, 56 How. N. Y. Prac. 228; *Deming v. Williams*, 26 Conn. 226; *Chapman v. Gray*, 8 Ga. 341.

still further concede, however reluctantly, that out of a regard for permitting married parties who are resolved upon separation without a divorce to arrange decently for the maintenance of wife and offspring, and for a just mutual disposition of property rights, our courts are in the latest cases following the English lead so as to sustain the enforcement of whatever covenants might be pronounced fair in themselves on behalf of parties separated or about to separate. Some of these cases sustain such covenants upon a suggestion that, separation being inevitable, they are prepared to make the best of it, not conceding the support of contracts calculated to favor a separation which has not yet taken place or been fully decided upon.¹ An unsatisfactory distinction truly, nor one likely to afford a resting place; as though this half countenance were not calculated of itself to favor future separation; and yet a legal distinction. It seems to stop short of enforcing specific performance of a written agreement for a separation deed, and to refuse direct countenance to a stipulation that husband and wife shall live apart in time to come.

§ 474. *Same Subject; Intervention of Trustees.*—An indenture with the intervention of a trustee or trustees is in this country held the safer sort of instrument where separation is contemplated, and such are the deeds usually drawn and construed by our courts. It is desirable that the husband and trustee mutually covenant together. But so considerably are husband and wife now emancipated from the need of intermediate parties, that a fair transaction of the present nature has been sometimes sustained in certain States, where no trustee at all was interposed.² This cannot be affirmed of all, nor of most of the United States;³ nor can such a contract ever prevail against the wife's interests where she, in such negotiation and arrangements, does not appear to have acted

¹ *Fox v. Davis*, 113 Mass. 255, per Endicott, J., and cases cited; *Hutton v. Hutton*, 3 Barr, 100; *Randall v. Randall*, 37 Mich. 563, per Cooley, C. J.; *Garver v. Miller*, 10 Ohio St. 527; *Robertson v. Robertson*, 25 Iowa, 350; *Waltace v. Bassett*, 41 Barb. 92; *Magee v. Magee*, 67 Barb. 487; *Dutton v. Dutton*, 30 Ind. 452.

² In *Randall v. Randall*, 37 Mich. 563, a deed passed from husband to wife, whose actual consideration was relinquishment of the right to support on her part.

³ *Simpson v. Simpson*, 4 Dana, 140; *Carter v. Carter*, 14 Sm. & M. 59; *Stephenson v. Osborne*, 41 Miss. 119; *McKenna v. Phillips*, 6 Whart. 571.

with perfect freedom and a perfect understanding of her individual rights.¹ Sometimes an agreement or bond to separate is executed by husband and wife, accompanied by the conveyance of property to a trustee for the use of the wife; which latter, however, is the instrument the court construes and upholds.²

§ 475. *Separation Deeds; What Provisions are supported.*—Inasmuch, then, as separation deeds are not enforced either in England or the United States, at the present day, without regard to the policy of stipulations or covenants in question, the limit of judicial support may be drawn at the support of provisions which, supposing separation inevitable, carry the fulfilment of conjugal duties and rights after a reasonable and becoming manner into that relation. For equity can only sanction what is fair and beneficial; and here cognizance is taken, not of the separation, but of circumstances and a settlement attending that state. The covenant or stipulation itself, the whole settlement, must be free from exception and such as equity might, under other instances of its jurisdiction, have sustained.³ Where, therefore, the provision is for the benefit of wife and children, as in providing suitable maintenance during the separation, such a covenant or stipulation is to be highly favored.⁴ Where an equitable and suitable division of the property is made, whose benefits have been enjoyed during the coverture, this, too, may well be upheld.⁵ The spouse who covenants to deliver up certain property to the other should make that covenant as advantageous to the latter as was reasonably intended.⁶

It is fair that a husband's covenant or stipulation of proper allowance for the wife's support should be accompanied by the trustee's covenant or stipulation of indemnity against his wife's debts.⁷

¹ *Switzer v. Switzer*, 26 Gratt. 574.

² *Keys v. Keys*, 11 Heisk. 425; *Dixon v. Dixon*, 23 N. J. Eq. 316.

³ *Switzer v. Switzer*, 26 Gratt. 574.

⁴ *Fox v. Davis*, 113 Mass. 255; *Randall v. Randall*, 87 Mich. 568; *Walker v. Walker*, 9 Wall. 743.

⁵ *Cooley, C. J.*, in *Randall v. Randall*, 87 Mich. 568.

⁶ Thus, it is held that a husband has no right to retain copies of his wife's journals and diaries which he, under a separation deed, has covenanted to deliver up. *Hamilton v. Hector*, L. R. 18 Eq. 511. And see *McAllister v. McAllister*, 10 Heisk. 345.

⁷ *Dupre v. Rein*, 56 How. (N. Y.) Prac. 228; *Harshberger v. Alger*, 81

In respect of directly compelling the married parties to live apart under their agreement, separation deeds cannot be pronounced good upon any just conception of public policy and the divorce laws. The language of Lord Brougham in *Warrender v. Warrender* is emphatic on this point.¹ American cases are to the same purport;² and especially must this rule hold true where the compulsion sought is under circumstances of separation not justifying a divorce.

§ 476. **Whether Separation Deeds bar Divorce Proceedings; Effect of a Spouse's Guilt.** — There is a general opinion, founded in sound policy, that articles of separation are no bar to proceedings for divorce for subsequent cause, as if one of the parties, after their execution, should commit adultery.³ Nor, as held in Maryland, does a separation deed bar proceedings for divorce for impotency, which, properly speaking, is a cause accruing before the separation took place.⁴ The discovery, after the execution of a deed of separation, that a spouse had been previously guilty of adultery, moreover, would not debar the innocent spouse from claiming rights of which that spouse had been kept in ignorance.⁵

Nor should a deed of separation be so construed as to deprive one spouse from returning to defend a suit for divorce brought by the other.⁶ If separation deeds should ever become, with judicial sanction, permissive of conjugal unfaithfulness, and obstructive of the usual remedies of an injured spouse, recognized by the legislature, bigamy and adultery will have gained a firm bulwark in the community.

It is held, and probably out of favor to a wife who is thus deprived of the shield to her honor she most needs, that a

Gratt. 52; *Reed v. Beazley*, 1 Blackf. 97. Such a provision of indemnity though usual, is not essential. *Smith v. Knowles*, 2 Grant, 413.

¹ *Warrender v. Warrender*, 2 Cl. & F. 488, 527, per Lord Brougham. Where a legacy is left to a married woman on condition that she shall live apart from her husband, the condition is contrary to good morals and void. *Brown v. Peck*, 1 Eden, 140. And see 1 Bish. Mar. & Div. § 685.

² *McCrocklin v. McCrocklin*, 2 B. Monr. 370; *McKenna v. Phillips*, 6 Whart. 571, per Gibson, C. J.

³ *Stokes v. Stokes*, 1 Mo. 324; *Rogers v. Rogers*, 4 Paige, 516.

⁴ *G. v. G.*, 33 Md. 401.

⁵ *Morrall v. Morrall*, L. R. 6 P. D. 98.

⁶ *Marlow v. Marlow*, 77 Ill. 683. Nor can terms of separation defeat a wife's claim for alimony. *Wilson v. Wilson*, 40 Iowa, 230.

settlement, unqualified in terms, made by the husband to a trustee for the use of his wife, on the execution of articles of separation between them, will not be set aside on her subsequent adultery while living apart from him,¹ nor even though for that adultery he finally procured a divorce.² Any provision for maintenance under a separation deed is, as we have elsewhere seen,³ now considered in England a provision in full of the wife's necessities; and the wife cannot, even though needy, pledge her husband's credit further, independently of his permission.⁴

But adultery of the one, and cause for divorce to the other, may put a new face upon this matter of maintenance. And it is lately held in England that the separated wife, having discovered that her husband had been guilty of incestuous adultery, and having obtained a decree for divorce on that ground, was entitled to the usual order for permanent alimony; and this, notwithstanding that under the separation deed she agreed to accept certain sums as a provision for her support, and not to sue her husband for any further maintenance.⁵ For all such deeds should be construed in the light of the status originally contemplated.

§ 477. *Legal and Illegal Conditions in Separation Deeds; Remedies.* — The potential mingling of legal and illegal conditions in these agreements, with the view of entering upon a status which of itself is inconsistent with a due fulfilment of the moral and legal duties of matrimony, occasions judicial confusion, which is more likely to increase than decrease while separation deeds are judicially recognized. But it is recently held in England that if some covenants in such a deed are legal and proper, while others are not, the former are enforceable by themselves.⁶ And trifling breaches on the part of one spouse have moreover been sometimes disre-

¹ *Dixon v. Dixon*, 23 N. J. Eq. 816; 24 N. J. Eq. 138. But had she been shown adulterous before execution of the deed, and the husband afterwards found it out, this might perhaps be considered fraudulent inducement to the conveyance.

² *Charlesworth v. Holt*, L. R. 9 Ex. 88.

³ *Supra*, Part IV., *Wife's Necessaries*.

⁴ *Eastland v. Burchell*, L. R. 3 Q. B. D. 432.

⁵ *Morrall v. Morrall*, L. R. 6 P. D. 98.

⁶ *Hamilton v. Hector*, L. R. 13 Eq.

garded, in order that the main purposes of the compact might be executed against another spouse whose fault it was that the separation became originally resolved upon.¹

In New York it is held that a husband and trustee having mutually covenanted under a separation deed, the latter may bring an action alone for the former's breach. But in such an action all facts by way of inducement should be stated in the complaint; and simply to set forth the agreement, and declare a breach of it for failure to pay, is not good pleading.²

§ 478. **Effect of Reconciliation on Separation Deeds, or Failure to Separate.**—Should the separated parties come together after a separation under articles, the consideration of those articles fails, and an immediate end is put to them;³ supposing, of course, that the reconciliation is genuine, and not a pretext by the one spouse in order to deprive the other of legal rights.⁴ And reconciliation taking place, the subsequent abandonment of one spouse by the other will not revive those articles.⁵ But it is held that such deeds may distinctly provide that the articles shall continue in operation should the parties ever resume cohabitation; in which case it will not be suspended during, at all events, what proves only a temporary reconciliation.⁶

Where no separation actually took place, the deed of separation is wholly void.⁷

§ 479. **Latest English Doctrine upholds Separation Deeds.**—While in many parts of the United States is seen an increasing tendency to adopt the English theory concerning separation covenants, with, however, more looseness as to the form such transactions shall take, the latest English cases quite transcend the distinctions behind which our courts take refuge, and the earlier *dicta* of their own Eldon and Brougham. Divorce being there regarded with less favor

¹ *Besant v. Wood*, L. R. 12 Ch. D. 606.

² *Dupre v. Rein*, 56 How. (N. Y.) Pr. 228.

³ *Shelthar v. Gregory*, 2 Wend. 222; *Wells v. Stout*, 9 Cal. 479.

⁴ *Marlow v. Marlow*, 77 Ill. 683.

⁵ *Shelthar v. Gregory*, 2 Wend. 222.

⁶ *Walker v. Beal*, 8 Cliff. 155. This case goes very far. The temporary reconciliation lasted fourteen years.

⁷ *Hamilton v. Hector*, L. R. 13 Eq. 511. See *Pride v. Bubb*, L. R. 7 Ch. 64.

than in the United States, notwithstanding the late statutes on the subject, trust deeds and voluntary separation are upon mature experience treated as, on the whole, the more decent and respectable method for unhappy couples to adopt, than that somewhat novel recourse to courts, which brings a scandalous cause into public controversy.¹ English policy, indeed, in its inception is quite different from American in this regard, a fact which American jurists should bear well in mind. And under legislation of date much later than the divorce acts which were copied from the United States, separation deeds are plainly legalized.²

§ 480. *Custody of Offspring under Modern English Separation Deeds.* — Thus, the custody of the offspring may now be distinctly provided for, as it would appear, in an English deed of separation. But at the same time, chancery, where the child is made a ward of the court, will protect the child's welfare.

There is a recent case in point which attracted much attention from the public relations of the parents. The father was a clergyman of the Church of England; the mother an atheist; and separation was caused by the latter spouse's peculiar religious and social opinions. The separated mother afterwards wrote and published a book of an obscene character (so the court held), among other things recommending checks on the increase of population. The daughter was to be left with the mother, under the separation deed, for eleven months of the year; but, besides offending by this publication, the mother refused to let the child receive a religious education. Accordingly a next friend of the infant removed the daughter from the mother's custody, and had her made a

¹ A modern text-writer of England, alluding to the new divorce acts of 20 & 21 Vict. c. 85, 21 & 22 Vict. c. 108, which extend the facilities of legal separation upon the American plan, admits that under those statutes "a more effectual separation can be obtained than under a simple deed or agreement to live apart." But, as he proceeds to observe, deeds of separation may yet be preferred, since they are

available for purposes which do not justify a legal grant of separation; so, too, "even in those instances in which the court affords relief, many, if not most persons, will prefer quietly arranging their differences by deed to painful discussions in a public court of justice." *Peachey Mar. Settl.* 647, 648.

² Stat. 36 & 37 Vict., cited in *Re Besant*, L. R. 11 Ch. D. 508.

ward of the court, when she was about eight years old. The Court of Chancery held that to bring the child up in her father's religion was a duty, and that the authorship of the obscene book was good reason, under the circumstances, for removing the child from the mother's custody.¹ Nor was such removal of the child from her mother's custody considered a suable breach of the husband's covenant, in this case, notwithstanding the friend of the infant removed her with the father's concurrence.²

§ 481. *Latest English Separation Deeds as to barring Divorce.* — On sound principles, as we have contended, a separation deed ought not to debar the separated parties from procuring a divorce, or legal separation, upon sufficient cause duly arising. American courts certainly shrink from recognizing anything like a private right by mutual consent to relax the marriage ties or dissolve the marriage compact.³ But where, in the instance just noticed, the husband had enforced the separation deed for the purposes of separation, and the wife set up by counter claim that she was entitled to a judicial separation, chancery ruled that the wife was barred by lapse of time and the deed of separation from doing so.⁴

§ 482. *English Suit for Restitution of Conjugal Rights; Whether Separation Deed bars.* — Upon still another point, namely, the restitution of conjugal rights, the English chancery has, of late, departed widely from its earlier precedents. In Great Britain, where this suit for restitution of conjugal rights has always been permitted, it was formerly ruled in the matrimonial courts, and seemed to be the well-settled doctrine, that a deed of separation afforded no bar to such a suit whenever either party chose to enforce the remedy; and this, even though the deed in terms forbade such proceedings.⁵ This was in accordance with the first idea that separation deeds should indirectly be tolerated for their beneficial

¹ *Re Besant*, L. R. 11 Ch. D. 508.

² *Besant v. Wood*, L. R. 12 Ch. D. 606.

³ *Supra*, § 476.

⁴ *Besant v. Wood*, L. R. 12 Ch. D. 606.

⁵ 1 Bish. Mar. & Div. § 684, and nu-

merous cases cited; *Mortimer v. Mortimer*, 2 Hag. Con. 810; *Smith v. Smith*, 4 Hag. Ec. 609; *Warrender v. Warrender*, 2 Cl. & F. 488, 561; *Spering v. Spering*, 8 Swab. & T. 211; *Anquez v. Anquez*, 1 P. & M. 176.

covenants as concerned parties bent upon separation, but not directly upheld. That rule has changed ; for, as the English statute now provides, a deed of separation which contains a covenant forbidding the suit for restitution of conjugal rights to be brought will bar such a suit.¹ And to one separated spouse chancery will now grant an injunction, by virtue of such a covenant, to restrain the other spouse from suing for restitution of conjugal rights.² Compromise, too, of the suit for restitution of conjugal rights, is permitted in England.³

There is this fundamental distinction between the English suit for divorce or judicial separation, and the suit for restitution of conjugal rights : that in the former instance the chief object is to free the petitioner in whole or in part from the marriage obligations ; but in the latter to control the other spouse so as to compel once more an unwilling cohabitation.⁴ Restitution of conjugal rights is a remedy unknown in the United States, where courts may finally part, but cannot forcibly reunite, the separated spouses.

§ 483. **Latest English Rule as to Specific Performance of Covenants to Separate.**—A modern English chancery court will furthermore enforce specific performance of a written agreement for a separation deed made between husband and an interested third person, such as his wife's father.⁵ It is not probable that such a rule obtains in any part of the United States ; and certainly no such decisions to that effect are to be found.

¹ *Marshall v. Marshall*, 39 L. T. 640.

² *Besant v. Wood*, L. R. 12 Ch. D. 606, and cases cited. Under the English divorce act of 20 & 21 Vict. c. 85, suits for restitution of conjugal rights are still permitted. 1 Bish. Mar. & Div. § 771. In *Hunt v. Hunt*, De G. F. & J. 221, 225, it appears that a decree of the English Master of the Rolls was reversed by the Lord Chancellor in favor of such a doctrine as that stated in the text ; appeal was taken to the House of Lords, but the wife died after argument and no decision was ever rendered. 1 Bish. 5th ed., § 634 ; *Rowley v. Rowley*, L. R. 1 H. L. Sc. 68.

³ *Stanes v. Stanes*, L. R. 3 P. D. 42.

As to compromising a divorce suit, see *Divorce*, *post*.

⁴ See language of court in *Firebrace v. Firebrace*, 39 L. T. 94. In the English suit for restitution of conjugal rights, the husband or wife makes formal complaint of the delinquent partner. A decree, as for instance on the wife's petition, requires the husband to receive her back and to treat her with conjugal affection ; and should the husband refuse obedience in both respects, he will be declared in contempt, and imprisoned until he obeys. 1 Bish. Mar. & Div. § 771.

⁵ *Gibbs v. Harding*, L. R. 5 Ch. 336.

§ 484. **Rights of One Separated Spouse upon the Decease of the Other.**—The doctrine of election has been applied to rights accruing under a deed of separation. Thus, where the husband covenanted to pay a fixed annual allowance to his separated wife, and subsequently, by will, gave her precisely the same allowance thus settled upon her, and died before her, it was held that she, as his widow, could not receive both sums, but must elect between the allowance payable under the will and that under the deed.¹

On the death of a wife living apart from her husband under a deed of separation, administration can be taken on her estate, and assets are recoverable by the legally appointed administrator, even though it be from the husband himself, in order that her debts be paid.² Dower and curtesy are not barred, as a rule, by separation; but by certain statutes, where husband and wife have involuntarily separated, or the wife willingly lives apart from the husband or in adultery, and no subsequent reconciliation takes place, the widow cannot claim dower in her deceased husband's lands.³

§ 485. **Separate Maintenance, where Husband is Unfaithful.**—There is a sort of equitable relief which courts afford to a married woman who lives apart from her husband because of his fault. This is known as the wife's separate maintenance. Local statute extends this relief, which is of chancery origin, and gives it a scope in these days correspondent to our married women's legislation. Where a wife, for instance, has been forced to leave her husband, because of his misconduct, she may come into equity to have secured to her a fair proportion of the rents and profits from land acquired by her since marriage and in his possession;⁴ or she may procure the aid of a court of equity in getting possession of such chattels as she may have contributed to the furnishing and adornment of the home.⁵ In general, if a wife is abandoned

¹ *Atkinson v. Littlewood*, L. R. 18 Eq. 595. ² *penses in case of separation, see supra, § 412.*

³ *McLaren v. Bradford*, 52 Ga. 648. ⁴ *McAlister v. Novenger*, 54 Mo. 251. See *supra*, § 451.

Whether rights of administration on the estate of a deceased spouse may be affected by their separation, see *supra*, § 406. As to the burial ex-

⁴ *Corley v. Corley*, 8 Baxt. 7.

⁵ *Black v. Black*, 30 N. J. Eq. 215. And see *State v. Dill*, 60 Mo. 483.

by her husband, or refused cohabitation, without fault on her part, and being left without adequate means of support, a bill in equity will lie to compel the husband to support her, without asking for or procuring a decree of divorce.¹

Statutes provide more specific separate relief to a married woman living apart from her husband "without her fault,"² or where she is "deserted by" her husband; it may be sometimes by way of temporary alimony, or again of the beneficial use of property he has left behind him.³ Whatever the mode or extent of relief thus afforded, the rule is that the wife will not be entitled to a decree of maintenance unless she can make out a case which would have justified a decree of judicial separation.⁴ It is not enough that the separation was voluntary and by mutual assent,⁵ or produced by the wife's own departure without sufficient cause. Nor can condoned misconduct of the husband be made the basis of her procedure.⁶ Alimony *pendente lite* is not properly allowed the wife who applies for separate maintenance.⁷

The savings of money transmitted from time to time by a husband to his wife from whom he was living separate, for her maintenance and support, are held in equity to be her separate estate.⁸

§ 486. **Abandonment; Wife's Right to earn, contract, &c.**—Abandonment by either spouse consists in leaving the other wilfully and with the intention of causing their perpetual separation. As to the right of the wife, when abandoned by her husband, to earn, contract, sue, and be sued, to much the

¹ *Garland v. Garland*, 50 Miss. 694; *Van Arsdalen v. Van Arsdalen*, 80 N. J. Eq. 359; *Douglas v. Douglas*, 5 Hun, 140.

² *Deenis v. Deenis*, 65 Ill. 167.

³ *Stanbrough v. Stanbrough*, 60 Ind. 275.

⁴ *Douglas v. Douglas*, 5 Hun (N. Y.), 140; *Black v. Black*, 30 N. J. Eq. 215.

⁵ *Cooper v. Cooper*, 4 Ill. App. 285.

⁶ *Deenis v. Deenis*, 65 Ill. 167.

⁷ *Foss v. Foss*, 2 Ill. App. 411; *Angelo v. Angelo*, 81 Ill. 251. The proceedings for maintenance authorized by

the New York law of 1871 is of a criminal nature, and not intended as a remedy for deserted wives, but a protection of the court against the expense of supporting paupers. *Bayne v. People*, 21 N. Y. Supr. 181.

⁸ *Brooke v. Brooke*, 4 Jur. n. s. 472.

It is admitted, says the court, that in law, if the husband claims it, it is his; (*Messenger v. Clarke*, 5 Ex. 388); but equity treats it as a fund needed possibly for her debts, and if the husband invokes its aid, the court will give it all to the wife as her equity to a settlement.

same effect as a *feme sole*, while such abandonment actually lasts, the current of American authority, legislative and judicial alike, decidedly favors so just a doctrine.¹ Modern married women's acts, as we have seen, often permit the wife to do quite or nearly as much when not abandoned at all. And in England recent statutes secure to a married woman privileges to a similar extent under like circumstances of abandonment.² The test is, observes a recent American case, whether the husband may be deemed to have renounced his marital rights and relations.³

The great contrariety of current legislation is a great obstruction, however, to formulating a decided rule of English and American jurisprudence on this point. We have seen that, under the old common-law doctrine of coverture, the wife could not sue or be sued, or otherwise act as a single woman, unless the husband was under the disability of a civil death, which meant originally banishment and abjuration of the realm. The wife's rights being enlarged by statute under such circumstances, we have therefore to inquire into the scope of any statute in point. Some of our local acts are construed as affording a substitute for the common-law rule, and not as merely cumulative, and hence require a

¹ See Shaw, C. J., in *Abbott v. Bayley*, 6 Pick. 89; *Benadum v. Pratt*, 1 Ohio St. 408; *Spier's Appeal*, 2 Casey, 233; *Mead v. Hughes*, 15 Ala. 141; *Rhea v. Rhenner*, 1 Pet. 105; *Moore v. Stevenson*, 27 Conn. 14; *Smith v. Silence*, 4 Iowa, 321; *Love v. Moynahan*, 16 Ill. 277; *Wilson v. Brown*, 2 Beas. 277; *Abshire v. Mather*, 27 Ind. 381; *Stith v. Patterson*, 3 Bush, 132; *Harrison v. Stewart*, 3 C. E. Green, 451; *Frary v. Booth*, 87 Vt. 78; *Bean v. Morgan*, 4 McCord, 148; *Barnett v. Leonard*, 66 Ind. 422. In *Coughlin v. Ryan*, 48 Mis. 99, the deserting husband's rights are excluded in the wife's separate property even after her death. And see the numerous statutes in almost every State in the Union, enlarging the rights of married women in such cases. A careful examination of these, and of the cases cited by Mr.

Bishop, leads the writer to views different from those expressed by him. 1 Bish. Mar. & Div. 5th ed. § 610 *et seq.*, and cases cited. The rule would not extend to suits for partition of lands held by husband and wife as tenants in common. *McDermott v. French*, 2 McCart. 78.

² See Stat. 20 & 21 Vict. c. 85; *Midland R. R. Co. v. Pye*, 10 C. B. n. s. 179. Chancery has long moulded its proceedings to secure a like privilege. *In re Lancaster*, 28 E. L. & Eq. 127; *Johnson v. Kirkwood*, 4 Dru. & War. 879. And see *Wahl v. Braun*, 38 E. L. & Eq. 300; *Macq. Hus. & Wife*, 99, 107, 108; *In re Rogers*, L. R. 1 C. P. 47; *McHenry v. Davies*, L. R. 10 Eq. 88. A right of action is conferred, too, under 33 & 34 Vict. c. 98. *Moore v. Robinson*, 27 W. R. 312.

³ *Ayer v. Warren*, 47 Me. 217.

literal interpretation.¹ In general such legislation is to be considered as grafted upon the common law of coverture which prevailed when this country was settled, and at the Revolution. It contemplates abandonment, and not what might be designed as a merely temporary withdrawal from cohabitation; and it regards the husband in general as completely out of the jurisdiction of the State, never having entered it, or else having forsaken it.²

As for "civil death," we have nothing in the United States which precisely corresponds to the old English sense; abjuration of the realm being altogether obsolete, and banishment or transportation being known in England, but not in the United States.³ The courts, themselves, upon the suggestion of analogies, have extended the principle which permits wives living apart from their husbands to sue and be sued as *feme sole* in exceptional instances. Thus the husband's transportation for a term of years has been treated in England as a proper case for admitting the wife to this independent condition;⁴ also where he becomes an alien enemy;⁵ in neither of which instances, it will be observed, is the husband's disability necessarily permanent, but only an absolute one while it lasts. Lord Mansfield extended the exception much further, allowing a wife who lived apart from her husband upon a separate maintenance to contract, sue, and be sued as a *feme sole*, even

¹ Hannon v. Madden, 10 Bush, 664.

² The right is afforded though the wife was abandoned before she arrived in the State, the husband never having been there. Blumenberg v. Adams, 49 Cal. 308. And see Tobin v. Galvin, 49 Cal. 34. The confinement of her husband in an insane asylum in another State may enlarge a wife's right of suit. Gustin v. Carpenter, 51 Vt. 585. A wife who is decreed a *feme sole* trader may convey her real estate by her sole deed. Wilson v. Coursein, 72 Penn. St. 306. See King v. Thompson, 87 Penn. St. 365. Or be sued alone as to her separate estate. Winternitz v. Porter, 86 Penn. St. 35. And see Cocke v. Garrett, 7 Baxt. 360. The absconding of her husband does not charge the wife

as a wrong-doer with reference to property left on the premises before she has taken some affirmative action. Campbell v. Quackenbush, 38 Mich. 287. Sole conveyance, upon privy examination, is provided in some States in cases of abandonment. Leonard v. Mason, 1 Lea, 384. If she lives apart from her husband, her separate property will be charged readily with debts contracted for her own benefit. Johnson v. Cummins, 1 C. E. Green, 97. See, further, Ann Berta Lodge v. Leverton, 42 Tex. 18.

³ 4 Bl. Com. 833.

⁴ Carroll v. Blencow, 4 Esp. 27.

⁵ Derry v. Mazarine, 1 Ld. Raym. 147. As to the wife's capacity as a *feme sole* trader by custom, see *supra*, § 800.

to the extent of charging her new husband with an unsettled claim thus arising.¹ Lord Kenyon, more technical and inclined to the old order, overturned that rule;² and, accordingly, it became re-established that no action at law could be maintained against a married woman unless her husband had abjured the realm.³ Equity, the doctrine of separate estate, and married women's acts, change once more the direction of the decisions in these later times. Under the English statutes there is a judicial record, so to speak, of the abandonment or desertion; a fair prerequisite not favored, apparently, under the married women's acts of the United States. The deserted wife procures a protection order protecting her earnings and property acquired during such desertion, and permitting her to sue and be sued as in case of a judicial separation.⁴

§ 487. *Prosecution of a Spouse for Abandonment or Desertion.* — Though a married man forsakes his family, he is not absolved from the legal and moral obligation of supporting them. To the end, chiefly, that the deserted wife and children may not become a burden to the public, many States now subject the husband to a criminal prosecution for his neglect of marital duty. By giving bond, with proper surety, to furnish the needful support, such unfaithful spouse goes clear,⁵ the punishment seldom extending to the simple abandonment.⁶ Prosecution for the abandonment of one's wife cannot be defended on the plea that the husband's suit for divorce is pending.⁷

¹ *Barwell v. Brooks*, 8 Dougl. 371; *burden on the public. People v. Walsh*, 18 N. Y. Supr. 292.

² *Marshall v. Rutton*, 8 T. R. 545.

³ 2 Kent Com. 161; 2 Bright Hus. & Wife, 71-74.

⁴ See *Nicholson v. Drury Buildings Co.*, L. R. 7 Ch. D. 48. But similar proceedings obtain in some States. *Rooker v. Rooker*, 60 Ind. 550; *Blake v. Nelson*, 29 La. Ann. 245.

⁵ *Commonwealth v. Jones*, 90 Penn. St. 431.

⁶ Under the New York act a husband cannot be convicted upon mere proof of abandonment; it must further be shown that the deserted wife has no adequate means of support, and is a

⁷ *State v. Gunzler*, 52 Mo. 172.

The separated wife's right to replevy from her husband articles of her own left in his house and possession appears to be maintained under New York statutes. *Howland v. Howland*, 20 Hun, 472.

If a wife is driven from home by the gross misconduct of her husband, she carries her marital rights with her, and has in many respects an enlarged capacity to provide for her necessities. *Sherrid v. Southwick*, 43 Mich. 516. See ch. 8, *post*, as to desertion.

CHAPTER II.

DIVORCE IN GENERAL.

§ 488. *Diversity of Divorce Laws in England and America.*—Divorce laws have constantly given rise to most interesting and earnest discussions; and men differ very widely in their conclusions, while all admit the subject to be of the most vital importance to the peace of families and the welfare of nations. Some favor a rigid divorce system as most conducive to the moral health of the people; others urge a lax system on the same grounds. On two points only do English and American jurists seem to agree: first, that the government has the right to dissolve a marriage during the lifetime of both parties, provided the reasons are weighty; second, that, unless those reasons are weighty, husband and wife should be divorced only by the hand of death.

§ 489. *Divorce as known to the Ancients.*—The ancient nations, all recognizing the necessity of some divorce legislation, differed in their methods of treatment. Among the Greeks, despite their intellectual refinement, the marriage institution was degraded, even in the palmiest days of Athens. The husband could send away his wife, and the wife could leave her husband. The procedure in such cases was quite simple, being apparently nothing more than a formal notice filed with the judicial magistrate, unless the parties were disposed to contend; in which case they went to trial. If they agreed to be divorced, that would be enough; hence the law was in their own hands; and, if divorced, they might marry again at pleasure.¹ In Rome, more of the moral and

¹ See p. 31 of Dr. Woolsey's *Treatise on Divorce and Divorce Legislation*, a little work recently published, which exhibits much careful research and scholarship, and clearly presents the recent legislation of England and America affecting this subject.

religious element prevailed; and so strictly was marriage respected in the early days, that no divorce is supposed to have occurred for more than five hundred years from the foundation of the city; if, indeed, we may fix the year of such foundation. The first recorded instance is, however, that of Spurius Carvilius Ruga, B.C. 231; and even this was a case of barrenness, which hence fell possibly under the modern head of void and voidable marriages.¹ But ancient Rome was built on family discipline, rather than domestic love; the husband exercised full sway, and the stately and somewhat severe Roman matron, who developed under influences at first adverse in appearance, disappeared entirely in the later dissolute and corrupt years of the Roman republic, and before an empire succeeded it.²

§ 490. *Jewish and Christian Views of Divorce.*—The ideal of marriage among the Hebrews was high: that husband and wife should cleave together and be one flesh; nevertheless, the usage of this nation, founded upon the Mosaic code, permitted the husband, as it would seem, to dismiss his wife at pleasure.³

It was this latter custom which called forth the merited rebuke of Christ, and occasioned him more than once to suggest a higher standard of marital constancy. These suggestions many have construed into an absolute prohibition of divorce except for the cause of adultery. Without accepting this construction of Scripture as the true one, or admitting all of the forced conclusions of commentators, which, whether correct or incorrect, must ever remain a matter for unsettled controversy,⁴ we may clearly trace in the New Testament

¹ See 1 Bish. Mar. & Div. 5th ed. § 23; Woolsey Div. 41. And see *supra*, Part I.

² Horace divined a true cause of Rome's decay, when he wrote,—

“Fecunda culpæ secula nuptias
Primum inquinavere et genus et
domos.

*Hoc fonte derivata clades
In patriam populumque fluxit.”*

Carm. Lib. iii. 6.

See Woolsey Div. 44 *et seq.*, where some of the historical instances are cited.

³ Deut. xxiv.; 1 Bish. Mar. & Div. 5th ed. § 25; Woolsey Div. 24.

⁴ For the discussion of this question the reader is referred to Woolsey Div. 51 *et seq.*, and authorities in 1 Bish. Mar. & Div. 5th ed. § 25, *n.*, where it will be perceived that writers on these New Testament texts are diametrically opposed to one another. The passages important to the issue are Matt. v. 31, 32; xix. 3-9; Mark x. 2-12; Luke xvi. 18. The present writer merely reminds strict constructionists of that well-

writings an intent to bring into prominence the moral obligations of the marriage state, to discountenance lax and temporary unions, and to warn the legislator that those whom God hath joined man may not with impunity put asunder for any trivial cause.

§ 490 a. *Divorce among Modern Christian Nations.* — The influence of Christianity has been felt in modern Europe; spreading to England, whence, too, it was brought to the wilds of America; the Christian rule ever shaping the policy of government. But this rule has received different methods of interpretation.¹ The Church of Rome treats marriage as a sacrament, and indissoluble without a special dispensation, even for adultery. Protestants are divided; all regarding adultery as a sufficient cause of divorce, many considering desertion equally so, others cruelty; while a strong current of authority in this country tends to multiply the legal occasions for divorce even down to such pretexts as incompatibility of temper.² So loose, indeed, and so confusing, is our State marriage and divorce legislation becoming, that it might be well to ask whether the cause of morality would not be promoted, if, by constitutional amendment, the whole subject were placed in the control of the general government; so that, at least, one uniform system could be applied, and the experiments of well-meaning reformers be subjected to an unerring and crucial test.

We have already commented³ upon the growing laxity of marriage in the United States as a civil institution. Here

known instance, which, though Biblical scholars may discard, laymen still believe authentic, where Christ refused to cast a stone at the adulterous woman, and bade her go and sin no more, as evincing that the great Christian Teacher had no design of ingrafting his code of morals, as a mere amendment, upon the Mosaic divorce law; which, as we understand it, would then have signified that a husband might "put away" his wife for adultery and have her stoned to death; that the wife could get no divorce at all; and that government was not concerned in the matter. Even

Dr. Woolsey seems compelled to admit that St. Paul sanctioned divorce for desertion. See his comments (p. 70 *et seq.*) upon 1 Cor. vii. 15. See also 1 Bish. Mar. & Div. § 26, n. While it may well be doubted whether the New Testament prescribes an inflexible code to bind all legislators, it is clear that all approach to "free marriage" is therein discountenanced.

¹ 1 Bish. Mar. & Div. § 26; Woolsey Div. 87 *et seq.*

² Conn. Laws, 1849; Woolsey Div. 205.

³ Part I., *supra*.

the moralist is confronted with two serious difficulties: *first*, in our universal tendency to greater social freedom as between the sexes, women themselves pressing for it; *second*, in the existence of thirty or forty distinct and independent jurisdictions over matters pertaining to marriage and divorce. Citizens of this Union, travelling readily from one State to another, find facilities for divorce and re-marriage always at hand; for sham divorce and sham re-marriage, perhaps, but for divorce and re-marriage sufficient to keep guilty parties in countenance, and perplex the tribunals which must apply the law.

An era of social and political revolution, such as the American people have lately passed through, is often succeeded by one conservative or slightly reactionary, just as the top gyrates in narrower circles when it steadies itself. But at the present rate, and in the present direction, there is danger lest the sanction of the courts to marriage and divorce be practically superseded during the next century by private discretion and individualism. It has been affirmed of our republic, and correctly, that "a nation of Mormons would be impossible, but not so one of libertines."¹

§ 491. *Modern Divorce the Subject of Legislation; Legislative Divorces.* — All private agreements between the married parties to dissolve their relation are void in England and the

¹ A writer in the *International Review*, August, 1881, shows how a man may, under the present conflict of divorce laws in the several United States, acquire by the complications of domicile, a number of wives, all lawful in a certain sense, and yet, of course, in strict truth, unlawful.

On the continent of Europe a similar confusion may be found, as, for instance, between France and Switzerland. As for Switzerland, according to a recent writer in the *London Guardian*, not only may a man thus have two lawful wives, but divorce is obtainable in that country by mutual consent; albeit this facility arises rather from the practice of the courts than from the letter of the law, which is to

the effect that when the judge is of opinion that there are circumstances "which render the life in common insupportable," he may, on the joint application of a married couple, dissolve their marriage. The practice of the courts being to regard a joint demand for divorce as a circumstance that renders life in common insupportable, divorce is practically procured by mutual consent. This writer adds that people in Switzerland, especially among the working classes, take each other on trial; the expressed understanding being that, after a certain time, if they do not get on well together, or desire a change, they shall join in an application for divorce. *London Guardian*, August, 1881.

United States, being contrary to the fundamental principle, long cherished by Christian nations, that government must interpose whenever a conjugal dissolution is sought. We are led, moreover, to regard the legislature as prescribing the rules and defining the policy of divorce, while the courts, on the other hand, apply those rules and that policy to such cases as may arise. But the legislature itself may dissolve a particular marriage, just as it may provide for the dissolution of marriages generally; for private or special acts are, like public statutes, within the recognized province of legislation.

The English Parliament, whose functions may be pronounced omnipotent within English jurisdiction, used, in fact, to pass special acts of divorce upon private petition for a long period prior to 1858; inasmuch as the ecclesiastical courts steadily refused from 1601, if not earlier, to divorce parties from the bond of matrimony, whatever the cause alleged, and decreeing nothing more than a legal separation from bed and board upon just cause.¹ This ecclesiastical decree affording to the injured little consolation, and requiring an innocent party to curb natural appetites more than ever, husbands whose wives were guilty of adultery began to apply to Parliament to declare their infelicitous marriage dissolved, and in 1669, as it appears, the first prayer of this kind was granted, the petitioner having previously procured a decree of separation in the spiritual court.² It is observable that this expensive and tedious process was practically confined, during the seventeenth century, to three injured persons, and they members of the British peerage; that during some one hundred and seventy years after the system of parliamentary divorce was established, the remedy was never awarded and probably never sought without some charge of adultery as a basis; and that while an innocent husband might thus be set free from an adulterous wife, almost as of course, an innocent wife could not so readily cast off the legal companionship of an adulterous husband.³ Later still, the English divorce

¹ 1 Bish. Mar. & Div. 5th ed. § 661; *Marriage from Lady de Roos*. Macq. H. L. *supra*, § 472. Pract. 471, 551.

² Lord de Roos here obtained a divorce. ³ Macq. H. L. Pract. 478; 1 Bish. Mar. & Div. § 662.

statutes of 1858 have practically dispensed with the legislative divorce for special cases, which divorce had always been cautiously granted.

§ 492. **Legislative Divorces ; Constitutional Objections.** — Legislative divorces are not unknown in American States ; though, as Mr. Bishop says, the practice, which was imported from England, prevailed here more in earlier times than at present. Sometimes the local legislature has administered its remedies concurrently with the courts ; sometimes it has divorced from bed and board, though more commonly from bond of matrimony ; sometimes its act has operated dissolution at once, and sometimes referred the case to some judicial tribunal for full investigation and proper action.¹ Objectionable as the legislative method is, from its cumbersomeness, cost, and the little real opportunity for an impartial hearing before such a body, we may regard it as perfectly legal in American States, unless constitutional objections apply ; objections which of course are inapplicable to an English Parliament.

As to constitutional objections, decisions differ in different States, like the provisions of different State constitutions. But it may be fairly affirmed that no objection is tenable under the Constitution of the United States as to legislative divorces, such divorces impairing no "obligation of contracts ;" words which, in the rational sense of that instrument, have no reference to the family status.² Nor, to cite objections under the language of State constitutions, ought a legislative divorce to be pronounced invalid as a "retrospective law."³ Nor, according to the better reasoning, is it void as an exercise of judicial power ; though the separation of executive, legislative, and judiciary, is not, we may add, pre-

¹ 1 Bish. Mar. & Div., 5th ed. § 663 ; 1 Met. (Ky.) 319 ; *contra*, Ponder v. Gray Young v. Naylor, 1 Hill Eq. 383 ; Berthelemy v. Johnston, 3 B. Monr. 90.

² See Story Conf. Laws, §§ 108, 200 ; 1 Bish. Mar. & Div. §§ 665-669, citing Starr v. Pease, 8 Conn. 541 ; Starr v. Hamilton, 1 Dedy (U. S.), 268 ; Adams v. Palmer, 51 Me. 480 ; Bingham v. Miller, 17 Ohio, 445 ; Cabell v. Cabell,

1 Met. (Ky.) 319 ; *contra*, Ponder v. Gray Young v. Naylor, 1 Hill Eq. 383 ; Berthelemy v. Johnston, 3 B. Monr. 90. ³ 1 Bish. Mar. & Div. §§ 670-679, citing West v. West, 2 Mass. 223 ; Starr v. Pease, 8 Conn. 541 ; Cabell v. Cabell, 1 Met. (Ky.) 319, &c. The statement in the text conforms to the decided weight of authority, including Mr. Bishop.

scribed for in all States in terms identical.¹ But as to this exercise of judicial power where a State constitution expressly prohibits the legislature from granting divorces,² or (to take the judicial standpoint) where the court may say that divorces for such a cause, or for all causes, come exclusively under their own jurisdiction,³ or that a legislative divorce in the particular instance would amount to interference with a suit already pending properly before the courts;⁴ here there may be found warrant for treating a legislative divorce as null and void. Where, under existing laws, the State court has no jurisdiction to dissolve the marriage, a legislative divorce has been pronounced good, there being no constitutional clause to the contrary.⁵

§ 493. **Legislative Divorce; Constitutional Restraints.** — But the effect of a legislative divorce is in this country considerably restrained by constitutional law. As a State legislature cannot divest vested rights by any statute, neither is it permitted to impose alimony or take from the vested rights of one spouse in order to bestow property upon the other.⁶ As the spouses thus divorced are, however, no longer enabled to fulfil the condition of widow or widower, it is considered, in conformity with the usual rule, that after a legislative divorce the divorced husband cannot become a complete tenant by the curtesy of his late wife's lands; nor the divorced wife, if she survive, take dower on the widow's allowance, since this would be no divesting of vested rights.⁷

§ 494. **Legislative Interference with Judicial Divorce.** — It is an unwarrantable exercise of legislative authority to interfere with the status of existing judicial sentences of divorce. As for instance, in Massachusetts, where a statute of 1874 provided, in contravention of the constitutional right of the

¹ 1 Bish. Mar. & Div. §§ 680-686, Cf. *Simonds v. Simonds*, 108 Mass. 572. and cases cited.

² *Teft v. Teft*, 3 Mich. 67.

³ 1 Bish. Mar. & Div. § 688; *Shannon v. Shannon*, 2 Gray, 285, *per Metcalf, J.*

⁴ *Gaines v. Gaines*, 9 B. Monr. 295; 1 Bish. § 692.

⁵ *Adams v. Palmer*, 51 Me. 480.

⁶ 1 Bish. Mar. & Div. § 693; *Crane v. Meginnis*, 1 Gill & J. 463; *Townsend v. Griffin*, 4 Harring. 440; *Jackson v. Sublett*, 10 B. Monr. 467.

⁷ 1 Bish. § 693; *Starr v. Pease*, 8 Conn. 541; *Levins v. Sleator*, 2 Greene, Iowa, 604; *Townsend v. Griffin*, 4 Harring. 440.

courts to determine divorce causes, that all divorces *nisi* heretofore decreed under a statute of 1870 should "have the force and effect of absolute divorces from the bonds of matrimony."¹ But a statute modifying the remedy where no judicial decree has been rendered before, is constitutional.²

§ 495. **Judicial Divorce; Grounds; Divorce from Bed and Board and from Bonds of Matrimony.**—Divorce is usually, however, in these days, a matter of judicial cognizance and sentence, as the proper investigation of such painful controversies fairly demands. The leading ground of divorce is adultery; besides which, desertion, cruelty, and kindred offences are frequently recognized as sufficient; and these kindred offences are greatly multiplied by statute in many of the United States.

Divorce by a court may be granted from bed and board (*a mensa et thoro*), or from the bonds of matrimony (*a vinculo*); the former, which is a sort of judicial separation, being applied to the less heinous offences; while the latter, which alone is complete, is the remedy for the greater offences; or, according to the most conservative policy, for adultery only. The one is partial divorce; the other final and full divorce.³ Divorce from bed and board, or *a mensa et thoro*, is sometimes called a separation; and the new English divorce act (Stat. 20 & 21 Vict. c. 85, § 7) provides that instead of the former decree, the court shall pronounce for a "judicial separation," with the same force and consequences as the divorce *a mensa et thoro* formerly had.⁴

Where the legislative grant of divorce for enumerated causes, and of divorce jurisdiction to the courts, is in terms permissive only, courts will incline to exercise a judicial discretion in accordance with the policy of the statute, and to withhold a judgment of divorce in cases not found to be within the benefits of the statute on their true merits.⁵

Divorces from bed and board and divorces from bonds of matrimony are similar as to the mode of procedure down to

¹ *Sparhawk v. Sparhawk*, 116 Mass. 315.

² *Wales v. Wales*, 119 Mass. 89. *Hunt v. Hunt*, 16 N. Y. Supr. 622.

³ See chapters 3, 4, *post*.

⁴ 2 Bish. Mar. & Div. § 225.

⁵ *Dutcher v. Dutcher*, 39 Wis. 651.

the pronouncing of the sentence, from which point they differ, being dissimilar in consequences.

§ 496. **Decrees of Nullity.** — We have considered the decree of nullity most suitably in connection with the avoidance of an objectionable marriage, whereas a decree of divorce more properly applies to causes of dissolution arising subsequent to the union, which do not impeach the marriage *ab origine*. But neither legislators nor the courts in these times adhere to so strict a distinction. Impotence, for instance, is frequently classified among the grounds for divorce; while proceedings for nullity are quite similar in most respects to those for divorce; and hence the decree of nullity may sometimes be found stated as a third kind of divorce in addition to those specified in the preceding section.¹

§ 497. **No Specific Performance of Marriage; Divorces Nisi.** — The principle of enforcing the specific performance of marriage vows, though perhaps theoretically commendable, proves in practice utterly futile, as was seen in the ecclesiastical remedy for restitution of conjugal rights, which fell into disrepute in England and was never permitted in this country.² But some check being proper upon decrees so momentous as those of divorce, we find in the English system, and in certain States, the principle of decrees *nisi*, which give delay for remedying error or affording to the parties a final opportunity for reconciliation. A divorce *nisi* does not put an end to the marriage relation, but is in the nature of a divorce from bed and board.³ Decrees of divorce from bed and board subserve, in the policy of some States, a like wise purpose; otherwise they must be of very doubtful expediency.⁴

§ 498. **Election by the Aggrieved Spouse as between the different kinds of Divorce.** — One spouse who is bent upon obtaining a divorce for the misconduct of the other rarely fails to petition for the fullest divorce. Yet property con-

¹ See 2 Bish. Mar. & Div. 5th ed., §§ 224, 225; *supra*, § 23.

² 1 Bish. Mar. & Div. 5th ed., § 31; *supra*, § 482. Though this remedy is still legally available in England, it is seldom put in force. A marriage companionship under judicial compulsion

must be deemed intolerable in modern times. *Supra*, § 482.

³ Fox v. Davis, 113 Mass. 255; Sparhawk v. Sparhawk, 116 Mass. 315; Garnett v. Garnett, 114 Mass. 347.

⁴ See 1 Bish. Mar. & Div. 5th ed., § 29; chapters 3, 4, *post*.

siderations, or possibly a lingering affection, might cause one to act otherwise; and such a discretion is sometimes permitted. Thus, in England, the new divorce act allows a party who is entitled to a divorce from the bond of matrimony to obtain, at choice, a decree for a judicial separation instead.¹ A similar right of election is permissively exercised under some American statutes.² In some States, again, the court itself is empowered to use discretion, by which we mean a judicial, and not an arbitrary discretion, as to making the divorce full or partial.³ But while it is not uncommon for our local statute to permit the party once divorced from bed and board, upon his petition and for suitable cause, to obtain afterwards a divorce, upon a lapse of time specified, from bonds of matrimony, the general rule of American States where both kinds of divorce obtain, is that the statute itself must determine whether, in the first instance, divorce shall be from bed and board or from bond of matrimony;⁴ while the former kind is in a sense to be regarded as preliminary to the other.

§ 499. **The Public as a Party in Divorce Suits.** — Out of the interest which the State takes in supporting the marriage institution, and the rights of helpless offspring who may rise to become its responsible citizens, springs what Mr. Bishop calls “a triangular suit, *sui generis*,” whenever proceedings for divorce are instituted. The divorce suit, in other words, becomes not a controversy between plaintiff and defendant alone (else divorce might be procured through their collusion, and they in effect dissolve their own marriage at pleasure); but government or the public is a third party, whose interests the court feels bound to protect.⁵ In a few of our States the public prosecuting officer is required to oppose suits for divorce; and in Scotland it was long the practice for government counsel to guard the public as against the private parties.⁶ Usually, however, the divorce court is left to pro-

¹ *Dent v. Dent*, L. R. 1 P. & M. 125; and *California*. 2 Bish. § 227, and *Mycock v. Mycock*, L. R. 2 P. & M. cases cited; *Rutledge v. Rutledge*, 5 Sneed, 554.

² 2 Bish. Mar. & Div. § 227, and cases cited; *Smith v. Smith*, 3 S. & R. 248.

⁴ 2 Bish. § 227.

⁵ 2 Bish. Mar. & Div. § 230.

⁶ 2 Bish. Mar. & Div. § 230; *Green*

³ As in *Tennessee*, *North Carolina*, *v. Green*, 7 Ind. 118.

tect the interests of the State without professional aid, and decides in pursuance of such a trust. We are, therefore, constrained to regard modern divorce procedure as something peculiar; not criminal, in its character, even though a penal prohibition to the guilty party were a result, but a civil suit, sounding in tort, seeking to redress a private wrong, while at the same time attracting the government or public besides the parties of record. "What the government does," says Mr. Bishop, "is, first, to protect the rights of persons not before the court, but liable to be affected by the decree or sentence; secondly, to guard the interests of the public as to its morals; and, thirdly and chiefly, to see that the status of its subjects, who are the parties of record, and sometimes their children, is properly determined or established."¹

For government does not concern itself with divorcing those who are minded to be reconciled and live on together, to which intent the party plaintiff is always free to discontinue the suit or bar himself.² But it denies all private right to procure a divorce for insufficient cause or by collusion, and requires that the plaintiff's case be made out with the same burden of proof, even though the defendant should default or consent to the divorce;³ and this, not so as to lighten the defendant's disadvantage in respect to costs, alimony, and the like, but because the public conscience must be satisfied, irrespective of the private individuals, that there was justice in the complainant's case.⁴

§ 500. **Agreements between Parties to a Divorce Suit; Collusion.** — Notwithstanding the disabilities of coverture, the wife has the right to bring her libel on her own behalf, or to defend, and hence to agree with reference to such divorce suit, like any other adverse party; with, however, the proviso that

¹ 2 Bish. Mar. & Div. 5th ed. § 234. Chancellor Kent defines a divorce suit as a private prosecution under the control of the party aggrieved, who may avail himself of it, or bar himself by his own act. 2 Kent Com. 100.

² 2 Kent Com. 100; 2 Bish. Mar. & Div. §§ 234, 235.

³ 2 Bish. Mar. & Div. § 235, and

cases cited; *Palmer v. Palmer*, 1 Paige, 276; *Welch v. Welch*, 16 Ark. 527; *Robinson v. Robinson*, 16 Mich. 79; *Scott v. Scott*, 17 Ind. 309.

⁴ 2 Bish. 236. Even an incidental agreement between the parties concerning alimony will not be sustained unless the court finds it just and equitable. *Daggett v. Daggett*, 5 Paige, 509.

no rule of public policy be transcended in consequence. Equity courts make little of the legal incapacity in a matrimonial emergency; ecclesiastical courts still less. It is held, accordingly, that husband and wife may release to one another the right to proceed in the courts to procure divorce for a particular offence already committed; for this is the essence of condonation, a subject we are presently to consider, and the public pronounces its satisfaction in finding the marriage upheld.¹ But if husband and wife, on the other hand, agreed to suppress pertinent and material evidence, or to take the conduct of the cause from the proper tribunal, or deceive the court and defraud the public, in the course of a divorce suit, this would be a species of collusion positively disadvantageous to marriage, and hence must not prevail.²

The promise of a defendant in a divorce suit already commenced, or about to be instituted, to make no defence, is void as against public policy; and accordingly the promise of a spouse to pay money upon such a consideration is held unenforceable; as is also, between the original parties and those not innocent and for value, a promissory note upon such consideration and no other.³ The same may be said of agreements or notes given in respect to alimony, for the similar purpose of facilitating a divorce and rendering the terms against the guilty party lighter than they ought to be.⁴ All collusive agreements between husband and wife to procure a divorce, when no real ground exists, is a fraud upon the court.⁵

§ 501. *Insanity no Bar to Divorce Proceedings.* — An insane spouse may, by guardian or committee, bring a divorce suit for cause against the guilty partner, with the same rights as though such complainant were in his or her right mind.⁶

¹ *Rowley v. Rowley*, L. R. 1 H. L. Sc. 68.

² 2 Bish. Mar. & Div. §§ 287, 288; *Goodwin v. Goodwin*, 4 Day, 848; *Hunt v. Hunt*, 39 L. T. 46; *Sickles v. Carson*, 26 N. J. Eq. 440; *Everhart v. Puckett*, 73 Ind. 409.

³ *Stoutenburg v. Lybrand*, 18 Ohio St. 228; *Kilbourn v. Field*, 78 Penn. St. 194; *Everhart v. Puckett*, 73 Ind. 409.

⁴ *Adams v. Adams*, 25 Minn. 72; *Sayles v. Sayles*, 1 Fost. 812.

⁵ Yet, after a divorce is granted, the party who would set the judgment aside for such fraudulent collusion, has the burden of proof. *Hopkins v. Hopkins*, 39 Wis. 167.

⁶ *Baker v. Baker*, L. R. 6 P. D. 12. The husband is not the proper person to be substituted as his wife's guardian

Nor can the insanity of a guilty spouse, occurring subsequently to the offence, afford a barrier to the proceedings of the innocent partner for a divorce.¹ Where the court finds both parties insane, the case should be disposed of as public policy and the interests of the parties require.²

§ 502. *Application of Divorce Statutes to Causes already existing.* — In the construction of divorce statutes the opinion is a reasonable one, that a new act shall not be presumed to include previous offences of the kind, so as to justify divorce in consequence of that which did not justify at the time of its commission.³ Thus, if desertion for a certain continuous period, or imprisonment in the State prison for felony, be made a new cause, the legislative intendment will be that a previous period of desertion shall not be computed, nor a previous imprisonment.⁴ Such, however, is not necessarily or absolutely the case; for statutes may and do refer to pre-existing causes of divorce, to offences present as well as future; and where a statute is plainly worded to that effect, it must be so upheld.⁵ Mr. Bishop inclines, in all cases of doubtful language, to presume that past as well as future offences were to be included;⁶ but where the act in question establishes an entirely new ground of divorce, it does not seem to us fair to give the presumption any such latitude.

But in the United States this inquiry leads further to the consideration of objections grounded in the several State constitutions, where may be found clauses forbidding retrospective laws, or laws which impair the obligations of contracts. A retrospective law, says Story, is one which "takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations

in such a case. *Fegan's Estate*, Myrick (Cal.), 10.

¹ *Mordaunt v. Moncreiffe*, L. R. 2 H. L. Sc. 374.

² *Garnett v. Garnett*, 114 Mass. 139. Here the insanity occurred after a divorce nisi had been granted, and the question arose afterwards as to making the decree absolute.

³ *Scott v. Scott*, 6 Ohio, 534; *Jarvis v. Jarvis*, 3 Edw. Ch. 462; 1 Bish. Mar. & Div. § 98; *Given v. Marr*, 27 Me. 212.

⁴ 1 Bish. § 99; *Greenlaw v. Greenlaw*, 12 N. H. 200.

⁵ *Stevens v. Stevens*, 1 Met. 279; *Cole v. Cole*, 27 Wis. 531.

⁶ 1 Bish. §§ 102, 103.

already past.”¹ But the terms “vested rights” and “transactions” seem hardly appropriate to the status or relation of marriage where dissolution is sought; while that of “contract” is decidedly inappropriate. This point is not, however, very clearly adjudicated as yet. Some States maintain quite strenuously that the legislature cannot dissolve, or authorize the courts to dissolve, a marriage for a pre-existing cause of offence.² Other States, on the contrary, sustain all such enactments, asserting that “retrospective” acts, and acts “impairing the obligation of contracts,” have no application whatever to the marriage institution and the reasons for dissolving it.³ To this latter view Mr. Bishop inclines; at the same time suggesting that upon the property rights of parties to a dissolved marriage there is room for a constitutional distinction as against retroactive legislation.⁴

CHAPTER III.

CAUSES OF DIVORCE.

§ 503. **Chief Causes of Divorce.** — In this chapter we shall consider in their order the chief causes of divorce, namely, I. Adultery; II. Cruelty; III. Desertion; after which we shall proceed, IV., to the various other causes specified from time to time by local statute.

I. § 504. **Adultery the Cause of Divorce most universally commended.** — Adultery is a plain offence, and quite universally admitted by legislation to justify the dissolution of a marriage, since the crime itself involves conjugal unfaithfulness at the most vital part of the marital relation. By adultery, in the present connection, we mean, of course, the voluntary sexual intercourse of either married party with some one,

¹ *Society v. Wheeler*, 2 Gallis. 105, 139.

² 1 Bish. Mar. & Div. § 698; *Clark v. Clark*, 10 N. H. 380; *Given v. Marr*, 27 Me. 212.

³ *Jones v. Jones*, 2 Overt. 2; *Smith v. Smith*, 3 S. & R. 248; *Berthelemy v. Johnson*, 3 B. Monr. 90.

⁴ 1 Bish. Mar. & Div. 5th ed. §§ 697, 698.

married or single, of the opposite sex, other than the offender's own spouse.¹ This is an offence not by itself indictable at common law, but left rather to the ecclesiastical or matrimonial courts for cognizance and discipline.² In the United States, however, it is punishable by fine and imprisonment under local statutes, which usually define the offence in addition. Some of these local codes incline to treating criminal proceedings for adultery, like those generally in the divorce courts, as matter for discipline at conjugal discretion, so that prosecution for adultery is forbidden except upon the complaint of the injured spouse.³

That adultery which justifies divorce must have been voluntary, involving the criminal intent. Where the spouse was ravished, on the one hand, or, on the other, held voluntary intercourse with one erroneously believed to be the conjugal partner, there is constituted no cause for a divorce; nor is one's wife to be set aside as an adulteress who married again, reasonably, but mistakenly, supposing her first husband dead, or herself divorced from him, and whose intercourse continued with the second husband until the bigamous marriage was annulled, and no longer.⁴ Carnal intercourse held with a third person while insane cannot afford ground of divorce against a spouse for adultery, according to the weightier authorities.⁵ But one's re-marriage under pretences known to be false cannot shield the guilty offender; nor is religious belief in the moral right of polygamy or concubinage to be alleged in defence of a libel for the cause of adultery.⁶

§ 505. **Adultery: Divorce usually from Bond of Matrimony.** — The Christian rule permitted the Jewish husband to put away his wife for this cause in preference to all others, if not to the exclusion of all others. And, adopting that principle, most English and American statutes now in force pro-

¹ Bouvier Dict. "Adultery."

² 4 Bl. Com. 65; *Mordaunt v. Moncreiffe*, L. R. 2 H. L. Sc. 374.

³ *People v. Knapp*, 42 Mich. 267.

⁴ *Ayl. Parer*, 226; 1 Bish. Mar. & Div. §§ 709, 710; *Valleau v. Valleau*, 6 Paige, 207.

⁵ *Broadstreet v. Broadstreet*, 7 Mass.

474; *Nichols v. Nichols*, 31 Vt. 328; *Wray v. Wray*, 19 Ala. 522. But see

Matchin v. Matchin, 6 Barr. 332.

⁶ 1 Bish. §§ 711, 718; *D'Aguilar v. D'Aguilar*, 1 Hag. Ec. 773.

nounce adultery cause for the fullest possible divorce, on an injured husband's behalf, which the law recognizes, namely, from bond of matrimony. Prior, however, in England, to 1858, when the Divorce Act took effect, the ecclesiastical courts took jurisdiction of such cases; and their practice, as already seen,¹ was for centuries, where the decree sought was not nullity, as for cause anterior to marriage, but divorce on cause arising subsequent, to pronounce nothing more than a sentence of separation from bed and board. These courts were influenced, doubtless, by the ancient Church dogma that marriage is a sacrament; and hence Protestants rich and powerful had recourse to Parliament for a full bill of divorce, just as Catholic sovereigns had sought dispensations from the Pope.²

§ 506. **Adultery: Whether equally a Cause of Divorce to either Spouse.** — A woman's chastity is of more concern to one's self, to society, and to a sound posterity, than a man's; her carnal appetite is less violent; nature sets a stronger seal upon her loose indulgence of passion; and when she yields guiltily to man's solicitation, so delicate is her organization, that the stain left upon her moral nature is deeper. Her body is the temple of posterity, and an illegitimate conception her lasting pollution. If a wife be child-bearing, she is disabled for long intervals from gratifying her husband's appetite, though that appetite should recur in regular course. All this might indicate that nature enjoins continence more rigidly upon the one conjugal partner than the other, instead of binding them alike to vigilant regulation of their passions. And hence the ruder codes punished the adultery of the wife, but not that of the husband.³ So far as relates to a wife living in the usual domestic seclusion, guilty love must generally precede her adultery, her mind and heart becoming depraved before

¹ *Supra*, § 491.

² Thus was it about 1600, and in days referred to by very early writers. Godol. Abr. 500. Mr. Bishop, however, considers (though admitting the point to be somewhat doubtful) that at still earlier periods of the English law all divorces known as separations from

bed and board, as well as by the shorter name divorce, were in legal effect dissolutions of the marriage bond, and that a different construction was applied afterwards. 1 Bish. Mar. & Div. §§ 661, 705.

³ See Introductory Chapter, § 5.

she yields a sinful assent; but with a husband this does not necessarily follow, since opportunity and the sexual desire operate ardently, quickly, and recklessly to some present sensual gratification.

In our enlightened community, however; husband and wife may be treated as on an equal plane in this respect, woman herself being strenuously desirous to have it so; hence American divorce statutes do not, for the most part, accord to the innocent spouse of one sex relief for conjugal unfaithfulness which they would deny reciprocally to the other.¹ British inclination is different; for the usual parliamentary practice was to withhold the special act of divorce where the wife petitioned against her adulterous husband, but to grant it where the guilt was reversed;² and even statute 20 & 21 Vict., c. 85, is still partial to the husband in divorces for dissolving the bond of marriage, inasmuch as the single crime condemns the one utterly, where it would not the other, unless with atrocious accompaniments.³

II. § 507. **Cruelty; What Sort justifies Divorce.** — Legal cruelty is more readily expounded by negative than affirmative language. Legislative enactments, which in practice should always be resorted to according to the jurisdiction, employ various phrases not always equivalent, such as the following: "cruel, inhuman, and barbarous treatment;" "extreme cruelty;" "cruel and inhuman treatment;" such conduct on the husband's part towards his wife as renders it "unsafe and improper for her to cohabit with him;" "intolerable cruelty;" "extreme and repeated cruelty;" "cruelty of treatment."⁴

¹ 1 Bish. Mar. & Div. §§ 704, 706. The language of the statute must serve for the criterion in each State. Living separately in adultery is, or was, the offence, as defined in North Carolina and Louisiana, for which divorce could be granted. *Long v. Long*, 2 Hawks. 189; *Adams v. Hurst*, 9 La. 243. This contemplates a separation without the fault of the libellant; thus, the adultery of a wife, committed by her after a separation caused by the husband's wrong, will not avail him to dissolve

the bonds of matrimony. *Tew v. Tew*, 80 N. C. 316.

² *Supra*, § 491.

³ See 1 Bish. § 65 and note. The husband may petition, under this statute, on the ground of the wife's adultery; but the wife, because of her husband's incestuous adultery, or bigamy with adultery, or because of rape, of sodomy, or bestiality on his part, or of adultery coupled with cruelty or desertion.

⁴ 1 Bish. § 718, and cases cited.

There are statutes in certain of the United States which come short of the extremity of cruelty altogether,¹ by justifying divorce for "excesses," "outrages," "indignities to the wife's person," "intolerable indignities," &c., such as to render living together insupportable and life burdensome. But it is perceived that this cause of divorce is designed regularly for the vindication of the weaker party, usually a wife, whose wrong from her husband's cruelty may be found greater, in the average of cases, than from his silent infidelities.

The English ecclesiastical courts long recognized cruelty, or *ævitia*, the offence our modern divorce acts so amplify and vary in phrase, as ground for pronouncing a sentence of divorce from bed and board. In general, this is the statute offence, whatever the difference of phrase, and whether the divorce be partial or complete. "The complaint," says Lord Stowell, "generally proceeds from the wife, as the weaker person; but it may come from the man, and has so done in several cases."²

What, then, is legal cruelty? Lord Stowell, in the leading case of *Evans v. Evans*, while declining to assert a positive definition, laid down the limitations of the rule with great strictness, and, at the same time, very justly. "The causes," he observed, "must be great and weighty, and such as show an absolute impossibility that the duties of the married life can be discharged. In a state of personal danger no duties can be discharged; for the duty of self-preservation must take place before the duties of marriage, which are secondary both in commencement and in obligation; but what falls short of this is with great caution to be admitted." And, as he further stated, the danger of life, limb, or health to the petitioner was usually alleged as the ground for judicial interference; a reasonable apprehension of bodily hurt being the indispensable condition.³

We may consider, then, that to entitle the wife to a divorce from her husband, on the ground of cruelty, there must

¹ *Ib.* §§ 718, 724, as to Louisiana and Texas provisions. See also the North Carolina expression in *Miller v. Miller*, 78 N. C. 102; *Miles v. Miles*, 76 Penn. St. 357; and miscellaneous causes of divorce, *post*.

² *Waring v. Waring*, 2 Phillim. 132.

³ *Evans v. Evans*, 1 Hag. Con. 85.

appear by the proof either actual violence on his part, or such other misbehavior as to fill her with reasonable apprehension of bodily injury. And, in general, it should be stated that wherever the conduct of one spouse to the other is such that the latter cannot continue cohabitation without reasonable ground for fearing such bodily harm from the former as seriously to obstruct the exercise of marital duties, or render the conjugal state unendurable, there legal cruelty exists, and cause for divorce. From this point of view, violence actually committed, or violence threatened, are treated as alike reprehensible.¹ Many of the latest cases rest upon the simple requirement that there be reasonable ground, under the circumstances, for the complaining party to believe that the continuance of marital intercourse would be attended with danger to life or health.²

§ 508. **Cruelty justifying Divorce; the Subject expounded.**—It may be supposed that with the modern denial of the husband's right of discipline, and the growing refinement of manners and equality of the sexes, not to add the readiness of the courts, so much greater now than formerly, to part unhappy couples, the definition shifts somewhat to accommodate the times. And hence injuries inflicted upon a wife, such as cause mental, more immediately than physical, suffering, are considered cause for divorce. The sensitive

¹ *Evans v. Evans*, 1 Hag. Con. 35; *Lockwood v. Lockwood*, 2 Curt. Ec. 281; *Westmeath v. Westmeath*, 4 Eng. Ec. 238; 1 Bish. Mar. & Div. 5th ed., §§ 715-717, and numerous cases cited, *Odom v. Odom*, 38 Ga. 286; *Close v. Close*, 25 N. J. Eq. 526; *Ruckman v. Ruckman*, 58 How. (N. Y.) Pr. 278; *Latham v. Latham*, 80 Gratt. 307. Mr. Bishop points out that the divorce suit for cruelty has its foundation in nature, since nature does not allow to woman the capacity of discharging well the duties of wife while she is in bodily fear. 1 Bish. § 725. Perhaps, however, the natural foundation is deeper still, and rests upon the utter inconsistency of cruelty with that mutual tenderness and love which the conjugal relation

requires, and indeed upon the wrong of individual oppression under all circumstances.

² The rule is thus stated in New Jersey. Where the husband has been guilty, or there is reasonable ground to apprehend that he will be guilty, of any actual violence which will endanger the safety or health of the wife, or where he has inflicted upon her any physical injury, accompanied by such persistent exhibition of ill-feeling and opprobrious epithets as will endanger her health, or render her life one of such extreme discomfort and wretchedness as to incapacitate her to discharge the duties of a wife, the decree of separation should be pronounced. *Close v. Close*, 25 N. J. Eq. 526.

organization of a weaker spouse always deserves consideration where the stronger brutally abused his power; yet some courts are found more considerate, or perhaps more compliant, in this respect than others, to compare English and American cases together. The older and more conservative doctrine on this point is clearly announced by Lord Stowell with great beauty of language. "What merely wounds the mental feelings is in few cases to be admitted, where not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty; they are high moral offences in the marriage state, undoubtedly; not innocent surely in any state of life; but still they are not that cruelty against which the law can relieve. Under such misconduct of either of the parties, for it may exist on one side as well as the other, the suffering party must bear in some degree the consequences of an injudicious connection; must subdue by decent resistance or by prudent conciliation; and if this cannot be done, both must suffer in silence."¹

This opinion was pronounced in 1790, since which time public views have changed upon the necessity that the aggrieved party should exercise conjugal forbearance when wilfully persecuted. The above quotation may still stand perhaps as sound law; but not so clearly what Lord Stowell further proceeded to state as concerned the infliction of mental suffering. An apprehension of physical danger he insisted upon as still the criterion; an apprehension reasonable of itself, and not "an apprehension arising merely from an exquisite and diseased sensibility of the mind." This, perhaps, we may admit, but not readily what follows. "Petty vexations applied to such a constitution of mind," he continued, "may certainly in time wear out the animal machine, but still they are not cases of legal relief; people must relieve themselves as well as they can by prudent resistance, by calling in the succors of religion and the consolation of friends; but the aid of courts is not to be resorted to in such cases

¹ *Evans v. Evans*, 1 Hag. Con. 35; 4 Eng. Ec. 310, 311.

with any effect.”¹ From the bias, more than the language, here employed, American, and probably English, courts of the present day are found to practically dissent. For while that which merely wounds the feelings and produces mental suffering falls short of legal cruelty, wilful vexations, apart from physical menace or injury, which prey upon the health of a delicate spouse, and threaten bodily harm by endangering the bodily health and unfitting for the duties of spouse, are usually treated at this day, especially if repeated and habitual after the harm it does is discovered, as amounting to legal cruelty such as to justify divorce on that ground.²

What must be the extent of the injury, or what particular acts should excite a reasonable apprehension of bodily harm, the circumstances of each case, which vary somewhat with the surroundings of life and the relations of the pair to society, should determine.

§ 509. *Cruelty justifying Divorce; Instances specified.* — To take some of the recent decisions. A slight degree of negligence about household affairs, on a wife's part, together with short and not inexcusable periods of absence, and the habitual indulgence of profane and insulting language towards her husband, is held not to constitute legal cruelty towards him.³ Nor violence on the part of either, committed during a quarrel in which both are at fault, and one spouse suffered about as much as the other.⁴ Nor a groundless prosecution of the husband by his wife for an assault, which she alleges, produced her miscarriage.⁵ Nor the manifestation by either

¹ *Evans v. Evans*, 1 Hag. Con. 35; 4 Eng. Ec. 810, 811. And see 1 Bish. Mar. & Div. 5th ed. § 722.

² *Staples, J.*, in a recent Virginia case, lays down the definition of cruelty with becoming caution, yet with such admissions. Austerity, rudeness, petulance, what merely wounds the feelings, without being accompanied by bodily injury or actual menace, does not, he concludes with Lord Stowell, amount to legal cruelty. But he admits that there may be cases in which the husband, without violence, actual or threatened, may make the marriage

state impossible to be endured; that there may be angry words, coarse and abusive language, humiliating insults, and annoyances in all the forms that malice can suggest, which may as effectually endanger life or health as personal violence, and which, therefore, would afford grounds of relief by the court. *Latham v. Latham*, 30 Gratt. 307.

³ *Bennett v. Bennett*, 24 Mich. 482.

⁴ *Soper v. Soper*, 29 Mich. 305; *Cooper v. Cooper*, 10 La. 249.

⁵ *Small v. Small*, 57 Ind. 568.

of mere heartless disregard of the marriage vow and obligations.¹ Nor simply breaking dishes, using grossly improper language, and in a momentary gust threatening to kick the spouse from the house.² Nor an occasional outburst of passion, nor mere abuse, however gross, as it is held, apart from treatment in the presence of others.³ Nor even words of menace under circumstances not justifying a belief that the threat was serious, and would be carried out. Nor adultery or lewdness with other women, which the offending husband carries on clandestinely.⁴ Nor mere neglect to supply food and clothing, at least under circumstances not wanton or heinous, since the wife has usually other remedies for such a case to keep her from suffering.⁵ Nor a slight slap or push not threatening bodily harm.⁶ Nor the denial of necessities or luxuries in general,⁷ especially if there be no pecuniary resources. Wantonly damaging a spouse's property can hardly be cited as legal cruelty.⁸ As for refusing marital intercourse, deserting the home or the nuptial bed, unnatural practices, and the like, such offences seem rather akin to other causes of divorce than cruelty.⁹

On the other hand, the repeated application of coarse epithets to a wife, accompanied once by actual bodily harm, and once by threats to take her life, has been held sufficient ground for divorce for cruelty.¹⁰ And the husband's failure to resent indecent proposals made to the wife by his hired man, where the husband besides jerked and threw his wife upon the floor when she was about to become a mother.¹¹ Even the malicious use of opprobrious and foul epithets before

¹ *Miller v. Miller*, 43 Iowa, 825.

² *Close v. Close*, 24 N. J. Eq. 338.

³ *Ruckman v. Ruckman*, 58 How. (N. Y.) Pr. 278; *Evans v. Evans*, 1 Hag. Con. 85; *Latham v. Latham*, 80 Gratt. 307.

⁴ *Miller v. Miller*, 78 N. C. 102. Nor is this offering "intolerable indignities" to a wife. *Id.*

⁵ *Faller v. Faller*, 10 Neb. 144. But to deliberately starve a wife, or withhold needful medical supplies, is different. *Butler v. Butler*, 1 Parsons, 829; *Smedley v. Smedley*, 30 Ala. 714.

⁶ *Finley v. Finley*, 9 Dana, 52.

⁷ "Of course, the denial of little indulgences and particular accommodations, which the delicacy of the world is apt to number among its necessities, is not cruelty." Lord Stowell, in *Evans v. Evans*, 1 Hag. Con. 85.

⁸ See 1 Bish. § 787; *Saunders v. Saunders*, 10 Jur. 143.

⁹ See *D'Aguilar v. D'Aguilar*, 1 Hag. Ec. 773; *Mogg v. Mogg*, 2 Add. Ec. 292. And see 1 Bish. §§ 748-752.

¹⁰ *Freeman v. Freeman*, 31 Wis. 235.

¹¹ *Beyer v. Beyer*, 50 Wis. 254.

others, imputing to the wife a lewd character, as this is the point upon which all virtuous women are most sensitive in feeling¹ though it may be doubted whether our courts would invariably go so far.² For a husband openly to consort with loose females and express his preference for them, or to make a brothel out of his own house, is held extreme cruelty in strong instances.³ As to language alone, menaces, threats of violence, seriously understood and inducing reasonable apprehension of bodily injury, or even charges of infidelity, made in bad faith and in aggravation thereof, make a strong case.⁴ Whipping a wife and declaring an intention to persist in it is legal cruelty;⁵ and so would be spitting upon her, pushing and dragging her about the room and slapping her; chastisement altogether unjustifiable, and showing a disposition dangerous to the conjugal continuance.⁶ So, too, unscrupulous intercourse with one's wife after being infected with a venereal disease, so as to communicate it to her.⁷ Habitual personal violence constitutes legal cruelty;⁸ and violence of any kind may be aggravated by being so manifested before others as to degrade and shame the spouse injured.⁹ Cruelty towards others, in order to annoy the spouse, may be legal cruelty.¹⁰ And so with other gross and wilful abuse of marital rights by the husband, resulting in injury or suffering to the wife, and justifying her reasonable apprehension.¹¹

§ 510. Cruelty justifying Divorce; Single Instances, &c. — A single gross instance of cruelty to the person may justify

¹ *Wheeler v. Wheeler*, 58 Iowa, 511; *Pinkard v. Pinkard*, 14 Texas, 356.

² Cf. *Durant v. Durant*, 1 Hag. Ec. 738; *Gale v. Gale*, 2 Robertson, 421; *Farnham v. Farnham*, 73 Ill. 497; *Day v. Day*, 56 N. H. 516. In 1 Bish. §§ 722-725, 726 and cases cited, such a malicious charge is considered "almost sufficient of itself;" though not when standing alone. Other circumstances inducing reasonable apprehension of danger more directly may be shown in this connection, as we shall show presently.

³ *McClung v. McClung*, 40 Mich. 493; *Lord Stowell*, in *Popkin v. Popkin*, 1 Hag. Ec. 765.

⁴ *Kennedy v. Kennedy*, 73 N. Y. 869.

⁵ *Taylor v. Taylor*, 76 N. C. 433. This case is under the peculiar statute as to "indignities," but it applies to cruelty generally.

⁶ *Saunders v. Saunders*, 1 Rob. Ec. 549.

⁷ *Cook v. Cook*, 32 N. J. Eq. 476; *Brown v. Brown*, L. R. 1 P. & D. 46; *Boardman v. Boardman*, L. R. 1 P. & D. 233.

⁸ *Johns v. Johns*, 57 Miss. 530.

⁹ See Lord Penzance in *Milner v. Milner*, 4 Swab. & T. 240.

¹⁰ *Saunders v. Saunders*, 10 Jur. 143; 1 Bish. Mar. & Div. § 736.

¹¹ *English v. English*, 27 N. J. Eq. 579.

divorce, especially if the circumstances indicate that the victim is in further bodily danger; or if, indeed, that act alone betrayed a cruel disposition in the offending spouse (since this may well excite apprehension), or perhaps if, as some cases are content to assert, the act itself endangers the victim's life or health.¹ But the provocation as well as the severity of the act should be considered, and cautious courts disincline to punish a single act so summarily where there was exasperation, or where the violence was slight, and when a repetition of the offence is not likely to occur unless unfairly provoked, and hence further cohabitation may not be thought unsafe.² That no reasonable apprehension of danger was entertained or existed at all may well be inferred when such single act is set up years after it was performed, or disconnected acts stretching over a long interval of uninterrupted marriage intercourse are made the ground of later proceedings for a divorce by a dissatisfied spouse.³ As against repeated or habitual acts of personal violence, however, redress sought within a reasonable time will undoubtedly be granted.

It is perceived that personal violence is not regarded as an indispensable element in the latest cases.⁴ And even though abusive language will not be by itself cause sufficient for divorce on the ground of legal cruelty, yet, where blows are proved, abusive language may be taken into view for determining their character as constituting the offence at issue.⁵ The nature and character of the violence and threats being material, this would tend to explain it as justifying the apprehension complained of; upon which suggestion evidence of

¹ 1 Bish. Mar. & Div. §§ 743-745; *Mahone v. Mahone*, 19 Cal. 626; *Beyer v. Beyer*, 50 Wis. 254. But "extreme and repeated cruelty" is the language of the Illinois statute. *Harman v. Harman*, 16 Ill. 85; *Embree v. Embree*, 58 Ill. 394.

² *Henderson v. Henderson*, 88 Ill. 248; *Coles v. Coles*, 82 N. J. Eq. 547; *Hoshall v. Hoshall*, 51 Md. 72; *Barrere v. Barrere*, 4 Johns. Ch. 187; *Richards v. Richards*, 1 Grant, 389.

³ *Horne v. Horne*, 1 Tenn. Ch. 259; *Henderson v. Henderson*, 88 Ill. 248.

⁴ *Wheeler v. Wheeler*, 53 Iowa, 511; *Black v. Black*, 30 N. J. Eq. 215. And see *Reeves v. Reeves*, 8 Swab. & T. 139; *Lauber v. Mast*, 16 La. Ann. 593.

⁵ *Farnham v. Farnham*, 73 Ill. 497; *Day v. Day*, 56 N. H. 316; *Dr. Lushington*, in *Dysart v. Dysart*, 1 Robertson, 106.

the spouse's drunkenness at the time has been admitted in the same connection;¹ and one's habitual abusive misconduct towards his spouse, and his ordinary ill-temper.²

§ 511. **Cruelty justifying Divorce; Temperament and Disposition; Mental and Bodily Suffering.**—The age, temperament, and disposition of the two spouses, and to some extent their rank and condition, ought fairly to be estimated, with the view of determining whether the reasonable apprehension of bodily harm was present in the case. Thus, in injuries which accomplish the physical hurt of a wife or husband through the infliction of mental pain and anguish, a spouse who does not appear of such sensitive nature and refined feelings that his or her health would be reasonably endangered by the conjugal misbehavior in question, cannot procure a divorce as for cruelty.³ For, on the whole, as to the harm which justifies the present divorce, the most intelligent cases estimate it from the point of physical, not mental hurt. Hence the mental infliction proves material when resulting in bodily hurt; so that a reasonable apprehension of losing one's bodily health and strength may be said to result from the conjugal misconduct complained of. Threats, malicious and wanton, opprobrious words and epithets falsely and wickedly bestowed, all these may so operate upon the timid and sensitive nature of a wife as to undermine her health and incapacitate her from the discharge of the functions of a marriage companion; and by such means the stronger party may in the particular instance have sought purposely to do her a bodily injury. Now, when the health is thus endangered by wanton brutality of language inducing reasonable apprehension of so sinister a design, we think the condition of legal cruelty is fulfilled. For it is admitted that the physical danger under discussion may be, if only sufficient in degree, danger either to the

¹ *Coursey v. Coursey*, 60 Ill. 186.

² *Otway v. Otway*, 2 Phillim. 95; *Westmeath v. Westmeath*, 4 Eng. Ec. 238.

³ 1 Bish. Mar. & Div. §§ 717, 742; *Bennett v. Bennett*, 24 Mich. 482. If the woman be aged or pregnant, or specially disabled, physical violence

by the husband is an aggravated offence. *D'Aguilar v. D'Aguilar*, 1 Hag. Ec. 773; *Westmeath v. Westmeath*, 4 Eng. Ec. 238; *Beyer v. Beyer*, 50 Wis. 254. *Scoble* the rank and condition of the parties cannot justify a disregard of the decencies of life. *Whispell v. Whispell*, 4 Barb. 217.

life or limb, such as blows and poisoning; or danger merely to the health;¹ it might be deliberate starvation or withholding needful medical assistance.² And after much show of reluctance in our earlier judges to investigating such abuses as produce ill-health by operating upon the mind, the weight of judicial opinion is now preponderating in that direction.³ If it seem a strain of principle to connect such mental inflictions with bodily injuries, we must recur to cruelty *per se*, apart from definitions of legal cruelty, and assure ourselves that purposely frightening a nervous and timorous spouse, and subduing by fear with the malicious design of producing suffering, and making the victim wretched instead of fostering love, is cruel, because it is inhuman, hard-hearted, and brutal.

§ 512. **Legal Cruelty; Apprehension of Danger.**—In fine, the reasonable apprehension of danger is the main ingredient which, all the circumstances considered, will, on the ground of cruelty, induce the divorce court to interfere and pronounce the sentence. Such was the English doctrine as expounded by Lord Stowell, Sir John Nicholl, and Dr. Lushington, and such is the doctrine as stated to-day by Mr. Bishop.⁴ Inasmuch, then, as divorce for cruelty is mainly allowed as a protection against probable anticipated cruelty, where there is no reasonable apprehension that the cruelty will continue, divorce is usually refused.⁵ Godolphin laid it down that even though the wife had blamelessly fled from her cruel husband, she would have to return if he gave adequate security against a repetition of his misconduct, or else forfeit all claim to alimony.⁶ That, however, offends one's innate sense

¹ Ayl. Parer. 228; 1 Bish. Mar. & Div. § 728.

² See 1 Bish. 735; Butler v. Butler, 1 Parsons, 329.

³ Kelly v. Kelly, L. R. 2 P. & D. 81, 59; Butler v. Butler, 1 Parsons, 329; Bailey v. Bailey, 97 Mass. 373; Powelson v. Powelson, 22 Cal. 358; Beyer v. Beyer, 60 Wis. 254; Wheeler v. Wheeler, 53 Iowa, 511; 1 Bish. § 733, and cases cited.

Under a statute which divorces for "such inhuman treatment as to endan-

ger the life" of the wife, danger to health is held to be included by construction; for to impair health is to jeopardize life. Cole v. Cole, 23 Iowa, 438.

⁴ 1 Bish. Mar. & Div. 5th ed. §§ 717, 719; Evans v. Evans, 1 Hag. Con. 35; Lockwood v. Lockwood, 2. Curt. Ec. 281; Westmeath v. Westmeath, 4 Eng. Ec. 238.

⁵ *Id.*; English v. English, 27 N. J. Eq. 579.

⁶ Godol. Abr. 509; 1 Bish. § 719.

of justice; for what bonded security against crime can relieve the innocent victim from danger? Sureties may respond in damages, but they cannot prevent the cruel act from being committed upon the first opportunity. No reported instance of modern times confirms such a doctrine; and it is held, on the other hand, that a mere offer of amendment will not absolve the guilty spouse from his misconduct.¹ Indeed the language of some of our late cases leads strongly to the inference that legal cruelty already committed, in the shape of a deed of actual violence, is enough of itself to entitle the aggrieved party to a divorce;² for while the heart remains unchanged, one cruel act is likely to be followed by another.

Reasonable apprehension being thus the great essential, menacing words, apart from blows, may the more readily be accepted as ground for a divorce for cruelty. "In these suits," observes Dr. Lushington, "the species of facts most generally adduced are, first, personal ill-treatment, which is of different kinds, such as blows, or bodily injury of any kind; secondly, threats, of such a description as would reasonably excite, in a mind of ordinary firmness, a fear of personal injury."³ But the circumstances, of course, should not be light or trifling. There must be reasonable cause for believing that menaces uttered will be carried into effect; and yet at the same time the aggrieved spouse is not compelled to wait until the injury is actually done.⁴

§ 513. **Legal Cruelty; Where the Husband is the Complaining Spouse.**—We have seen that cruelty may furnish a complaint for divorce to either spouse, under appropriate circumstances. Such was the purport of Lord Stowell's language in the case we have so frequently alluded to.⁵ The husband's prayer for judicial separation was allowed on account of his wife's cruelty in an English case decided by Lord Penzance in 1864. The wife had habitually shown great and unrestrained vio-

¹ *Kinsey v. Kinsey*, 1 Yeates, 78; 1 Bish. Mar. & Div. §§ 729, 730; *Kennedy v. Kennedy*, 73 N. Y. 369, and

² See *Ruckman v. Ruckman*, 58 cases cited; *Beebe v. Beebe*, 10 Iowa, 133; *Bailey v. Bailey*, 97 Mass. 373. How. (N. Y.) Pr. 378; *Close v. Close*, 20 N. J. Eq. 536.

³ *Neeld v. Neeld*, 4 Hag. Ec. 263.

⁴ *Evans v. Evans*, 1 Hag. Con. 35;

⁵ *Evans v. Evans*, 1 Hag. Con. 35; *supra*, § 507.

lence; irritability on all, even the slightest, occasions; her bursts of unprovoked ill temper, and the abuse she heaped constantly upon her husband, were fully proved. But she went further; and "emboldened by a policy of passive resistance which he had adopted from religious motives, she sought to rule his conduct by threats of personal attack; and finally she thrust herself before him on the steps of a public chapel, the service of which he was attending against her will; assailed him with abuse and blows, and, as the sole refuge from an unseemly struggle, drove him with ignominy home."¹ The excitement and nervous shock threw the husband into a fit, and caused him great mental and bodily prostration.

§ 514. **Legal Cruelty; Whether Physical Superiority should debar Complainant.** — This case suggested what all must admit, that the physical ability of the male spouse to defend himself ought to furnish no decisive obstruction to his right of relief against woman's cruelty. Many men scruple to lay violent hands on a woman, or to contend in such unseemly quarrels; and they would sooner submit to a blow. A sick or crippled husband, or even an able-bodied husband, may be physically weaker, moreover, than his wife in such instances. And once more, the use of poison, loaded fire-arms, and the like, puts physical advantage aside; so that the reckless wife, strong of nerve, may well overpower the bravest and most vigorous of husbands, when the latter is prudent enough to appreciate the danger.²

Justly, therefore, cruelty is permitted to be a cause of divorce on behalf of either husband or wife, under the law which prevails in England and most parts of the United States.³ But under some of our local statutes, the wife is specified as the only spouse to whom such complaints of marital misconduct are available for dissolving the union.⁴

III. § 515. **Desertion as a Cause for Divorce.** — Desertion, or the wilful abandonment of one spouse by the other, was not

¹ *Prichard v. Prichard*, 8 Swab. & T. 523.

² 1 Bish. Mar. & Div. §§ 761-763, and cases cited.

³ In *Beebe v. Beebe*, 10 Iowa, 183, a husband had just apprehension that his wife meant to poison him.

⁴ *Id.*

a recognized cause of divorce under the ecclesiastical law of England, as promulgated at the settlement of this country. Apparently for an injured wife the suit for restitution of conjugal rights, and the sole privileges if the husband was *civiliter mortuus*, were deemed by those courts a fair substitute, while the husband, whose wife wrongfully deserted him, was perhaps as well off without a sentence of judicial separation as he would have been with one. That public policy, however, was not a solid objection to divorce on this ground, more than for cruelty, may be inferred from Godolphin's commentary,¹ and the statute elsewhere noticed,² which permitted of a new marriage as one at all events innocent, when nothing had been heard of the absent spouse for seven years.

But the English divorce statute, with, perhaps, a disposition to place the deserted wife and deserted husband on a more equal plane, as well as to put a rational limit, adds to adultery and cruelty, "desertion without cause for two years and upwards," as a third cause for judicial separation.³

Meanwhile, in most parts of the United States, where divorce is the only remedy to apply to such cases, desertion for a specified period has been a permitted cause for a divorce, perhaps for a limited divorce in the first instance; yet quite commonly, as in the case of adultery and cruelty, for a divorce, ultimately or immediately, from bonds of matrimony. The phraseology of the legislature varies in different States, as in the cause of cruelty; but "wilful desertion," "wilful absence," "wilful, obstinate, and continued desertion," or "wilful and continued desertion," appears to be the common form of expression; while as to the length of time the space of "one," "two," or "three," or even "five" years may be found stated; "three years" being, perhaps, a fair medium for legislators to reckon.⁴ On the whole, the offence appears to be the

¹ "The civil and canon law do allow of divorce after a *long absence*, but are not agreed touching the time of that absence." After stating that some held two years a sufficient time, and others five years, he refers to the seven years' absence as operating much like a divorce, and adds that if the wife refuse to dwell with her Christian

husband the canon law allows him to leave her. "But the truth is," says this writer, "no absence, be it for any time whatever, doth properly cause a divorce in law." Godol. Ab. 194; 1 Bish. Mar. & Div. § 771.

² *Supra*, § 25.

³ Act 20 & 21 Vict. c. 85, § 16.

⁴ See 1 Bish. §§ 773, 775.

same in principle both in England and the United States, with very rare exceptions, the only statutory variation of consequence being as to the length of desertion which should perfect the right of the injured spouse.¹

§ 516. **Desertion as a Cause for Divorce; Ingredients of the Offence.**—According to the latest authorities, it may be laid down that legal desertion, in the present sense of our divorce acts, imports three things: (1) An actual cessation of cohabitation for the period specified; (2) The wilful intent of the absent spouse to desert; (3) Desertion by that spouse against the will of the other. Unless these three things concur, there is no legal desertion established such as to justify a divorce in the petitioner's favor.² Thus, if the husband leaves his wife in his house, and subsequently returns, with her consent, so as to see the children habitually, though he does not cohabit with her, this is not legal desertion.³ Or, if an ill-treated wife tells her husband that either he must leave the house or else she will, his leaving her will not amount to desertion, so as to give her ground of divorce, for this is compliance with her own wishes.⁴ Or, if the spouses are merely shown to have lived separate, the husband rendering no support to the wife, this is not legal desertion.⁵ In short, a separation procured by artful effort, or by mutual consent, or by a ready acquiescence in a request, cannot be construed into legal desertion, so as to constitute the basis of a suit for divorce like the present; for, if it could, all discontented couples might find a way of procuring their freedom very readily, with little scandal and delay, by

¹ "Abandonment" is the word used in some statutes, and this implies wilfully leaving the spouse with intent to cause a palpable separation; it implies, therefore, actual desertion. *Stanbrough v. Stanbrough*, 60 Ind. 275. As to "wilful and malicious abandonment," see *Majors v. Majors*, 1 Tenn. Ch. 264. And see *Merrill v. Flint*, 28 La. Ann. 194.

² *Sergeant v. Sergeant*, 33 N. J. Eq. 204; 1 Bish. Mar. & Div. § 777, which mentions only the two former ingredients of the offence, like many of the

cases here cited; *Latham v. Latham*, 30 Gratt. 307; *Morrison v. Morrison*, 20 Cal. 431; *Bailey v. Bailey*, 21 Gratt. 43.

³ *Taylor v. Taylor*, 44 L. T. n. s. 31.

⁴ *Kestler v. Kestler*, 31 N. J. Eq. 197. If his ill-treatment amounted to cruelty or adultery, she would have ground of divorce; but where it did not, separation had no legal justification.

⁵ *Bourquin v. Bourquin*, 33 N. J. Eq. 7.

living apart for one, two, or three years, as the case might be.¹

§ 517. *Legal Desertion; Claiming to have been Deserted.*—Cases go so far in their opposition to a voluntary separation, as to require active effort on the part of the deserted spouse to induce the erring one to return, wherever opportunity for such inducement existed, and the act of desertion was not committed under heinous circumstances. Thus, a husband's petition for divorce on the ground of desertion has been refused, where it appeared that the wife would have returned had he invited her to do so, and he took no pains to bring her back.² And where the wife, who has wilfully deserted, repents, and it is her husband's compulsory conduct, not her own obstinacy, which causes the absence to continue further for the statutory period, the husband is not entitled to a divorce.³ Marital duty requires even an aggrieved spouse to repair rather than widen the breach when slight differences have arisen, and generously to pardon an error hastily committed, if trivial of itself, and followed quickly by repentance. Especially does this hold true of a husband's conduct towards his wife; for to encourage a woman, ever so slightly, to withdraw from the protection of the home, is to invite her irretrievable ruin; his judgment should be sounder than hers, and in this respect the measure of his generosity should be ampler.

It is not to be insisted upon, however, that the spouse who is in the right, even though the stronger, shall yield to the weaker, if the latter deliberately and persistently fails in the conjugal duties, or sacrifice self-respect in the effort to bring back the erring. Hence, a husband, whose wife has deserted him without cause, and remains away after full opportunity to realize the folly of her act, need not attempt to induce her to return when it is clear that the effort to do so would be unavailing; and in due time he may procure his decree.⁴

¹ Cases *supra*; *Cox v. Cox*, 35 Mich. 461; *Latham v. Latham*, 30 Gratt. 307; *McGowen v. McGowen*, 52 Tex. 657. see *Mayer v. Mayer*, 30 N. J. Eq. 411.

³ *Bowlby v. Bowlby*, 25 N. J. Eq. 406.

² *Thorpe v. Thorpe*, 9 R. I. 57. And

⁴ *Trall v. Trall*, 32 N. J. Eq. 231.

A hasty request or permission to depart is not conclusive against the spouse deserted. As to the wife, for instance, it is held that if she tells the husband to go his way, and then immediately retracts, and yet he in a passion leaves her, makes no later attempt at reconciliation, contributes nothing to her support, communicates nothing, and gives no opportunity for a return of domestic harmony, she may procure her divorce for his desertion at the expiration of the statute period.¹

§ 518. **Legal Desertion; Conduct of the Spouse whose Desertion is alleged.** — Wilful intent to desert on the part of the absent spouse must appear in the proof. And, accordingly, a libel cannot be maintained as for desertion where the complainant was the party who really deserted or was otherwise at fault in causing separation. Even where a wife leaves the matrimonial domicile, and returns to her father's house because of her husband's inability to provide for her support, no such desertion is constituted on his part as entitles her to ask for divorce, but she herself rather is remiss.² Nor is such divorce available to her where she leaves him because he gambles besides;³ or because he lied to her.⁴

Upon the same principle of wilful desertion, a wife is held actually at fault in deserting where she left her husband on the trivial ground that he would not maintain her rightful authority as a wife over the servants.⁵ And since the husband has the right to choose the matrimonial domicile, according to the principles of universal law, elsewhere dwelt upon,⁶ the wife's persistent and continued refusal, without full justification, to live with her husband at the place honestly and rationally selected by him for the family abode, constitutes legal desertion on her part, and entitles him to a divorce.⁷ So, too, where they have lived at her father's house, and the husband, upon provocation from her father, or for some other just cause, leaves the house, and requests his wife to accom-

¹ *Schanck v. Schank*, 33 N. J. Eq. 368. See also *Childs v. Childs*, 49 Md. 509.

² *Bennett v. Bennett*, 43 Conn. 313.

³ *Sandford v. Sandford*, 32 N. J. Eq. 420.

⁴ *Angelo v. Angelo*, 81 Ill. 251.

⁵ *Harris v. Harris*, 81 Gratt. 13.

⁶ *Supra*, § 59.

⁷ *Hunt v. Hunt*, 29 N. J. Eq. 96.

pany him, she ought to do so, and, at the least, her persistent refusal to obey him debars her from construing his consequent absence into legal desertion.¹ But if the wife leaves the matrimonial abode because of the husband's gross misconduct, his personal violence, coarse abuse or threats, and persistent neglect of duty, whatever her rights, he cannot avail himself of her departure as legal desertion so as to obtain a divorce on his own application.²

A husband deserts, in the legal sense, where he leaves his wife, promising to return presently, and then fails to return, though requested and promising to do so; and here the statutory period having expired while he continues absent, the wife may have her divorce.³ But his mere absence on pleasure or business is not desertion.⁴ Furthermore, if he drives his wife from the house by cruel treatment, it is not enough that she may allege cruelty in her libel, but this is frequently held to constitute, besides, the offence of legal desertion on his part.⁵

§ 519. **Whether One must withdraw in Order to desert.**—It does not follow necessarily, then, according to the current of divorce precedents, that the party who deserts, in the legal sense, withdraws as of course from the matrimonial abode; for one who wilfully and wrongfully draws the matrimonial abode away from the other, so to speak, while remaining in it alone, becomes amenable to that charge; it is enough to have discontinued cohabitation wilfully and without justification.⁶ Stratagem will not here avail more than violence in producing so unhappy a state of things, for it is blame in either spouse as to bringing about the separation that the law

¹ *Mayer v. Mayer*, 30 N. J. Eq. 411.

² *Meldowney v. Meldowney*, 27 N. J. Eq. 328. And see *Childs v. Childs*, 49 Md. 509; *Cornish v. Cornish*, 28 N. J. Eq. 208; *Rittenhouse v. Rittenhouse*, 29 N. J. Eq. 274.

³ *Brinkerhoff v. Brinkerhoff*, 29 N. J. Eq. 132.

⁴ *Jones v. Jones*, 13 Ala. 145; *Cook v. Cook*, 2 Beasley, 263; *Pidge v. Pidge*, 8 Met. 257; *Gaines v. Gaines*, 9 B. Monr. 295; 1 Bish. § 783.

⁵ 1 Bish. Mar. & Div. §§ 787-794; *Harding v. Harding*, 22 Md. 337; *Morris v. Morris*, 20 Ala. 168; *Kinsey v. Kinsey*, 37 Ala. 393; *Wood v. Wood*, 5 Ire. 674; *Levering v. Levering*, 16 Md. 213; *Houliston v. Smyth*, 3 Bing. 127. And see *supra*, § 111.

⁶ *Meldowney v. Meldowney*, 27 N. J. Eq. 328; *Harding v. Harding*, and other authorities cited in note preceding. As to wrongfully turning a wife out of doors, see also *Sowers's Appeal*, 89 Penn. St. 173.

chiefly regards.¹ This, however, is not tantamount to declaring that cruel treatment by one spouse, whatever that spouse may have intended, constitutes desertion of the other, so that there arises of necessity a choice of grounds; but that, when carried so far that the latter spouse has to leave, the circumstances will raise a presumption that the cruel partner thereby purposed bringing about the separation, which presumption his acquiescence afterwards in the continuous absence will render almost conclusive against him.² Probably, if both spouses were shown equally at fault in producing the separation, neither could claim a divorce.³

§ 520. **Bona Fide Discontinuance of Cohabitation for Judicial Proceedings not Desertion.**—The *bona fide* withdrawal from cohabitation for adverse judicial proceedings, such as procuring a nullity of marriage, or bringing a libel for divorce because of the partner's adultery, is not to be alleged as legal desertion on the part of such spouse, whatever the fate of the suit, or reasonable delays attending it; for this is not wilful and wrongful;⁴ but, on the other hand, a party whose purpose is wilful desertion cannot make legal proceedings he may have instituted furnish a fraudulent pretext for his misconduct.⁵

§ 521. **Legal Desertion; Distance of Departure; When Desertion commences.**—It is immaterial whether the spouse who in effect means to desert removes to a greater or less distance, except so far as distance might serve to illustrate the motives of either conjugal party, the test being, of course, the intent to abandon.⁶ And as to this intent to abandon, policy requires that it continue for a certain length of time, without insisting that it commences at the precise date of separation.

¹ Cossan v. Cossan, Wright, 147.

² See Marker v. Marker, 3 Stock. 256. A case which tends to the opposite conclusion, and to deny that one deserts his wife who cruelly compels her to leave him, is Pidge v. Pidge, 3 Met. 257, Putnam, J., dissenting. As Mr. Bishop well observes, the court in correctness should have directed its attention to the purpose which that husband entertained in producing the wife's departure.

³ See Rittenhouse v. Rittenhouse,

29 N. J. Eq. 274; also, as to justification of divorce, *post*.

⁴ Clowes v. Clowes, 9 Jur. 356; Edwards v. Green, 9 La. Ann. 317; Marsh v. Marsh, 1 McCarter, 315; Salorgne v. Salorgne, 6 Mo. App. 602.

⁵ 1 Bish. Mar. & Div. §§ 801, 802; Doyle v. Doyle, 26 Mo. 545; Simons v. Simons, 18 Tex. 468.

⁶ Ahrenfeldt v. Ahrenfeldt, 1 Hoffman, 47; Gregory v. Pierce, 4 Met. 478; 1 Bish. § 777.

Thus a spouse might leave home intending to take a journey, to visit friends and the like, and, upon reflection, or while subject to sinister influences from without, conclude to permanently abandon, and act accordingly. Where such is the case, desertion commences, in the legal sense, from the time that purpose is formed by the absent spouse and acted upon, contrary, as all the circumstances may consistently indicate, to the wish of the other.¹

§ 522. **Legal Desertion following upon Voluntary Separation; Refusal to return.**—There is some embarrassment found, however, in applying the rule of wilful desertion to parties who have voluntarily separated in the first instance. Separation by mutual consent cannot, we have seen, be construed into legal desertion. But can one of the separating parties, by turning what was voluntary into involuntary on his or her part, fasten upon the other the wilful purpose, if the latter persist in remaining absent, and carrying out the original arrangement? According to the weight of American authority this may be done. In a very late New Jersey case, in fact, two parties having voluntarily separated, the one made sincere efforts afterwards to terminate that condition, but the other continued stubborn; and it was held that the stubborn party legally deserted from the time the attempt at reconciliation commenced.² Much earlier a New York case decided, and upon a broader application of the doctrine, that where separation originated in mutual consent, and the husband continued to furnish support to his wife for a while, and then wrote a letter which indicated that further maintenance would be withheld by him until formal proceedings were had for divorce, the husband deserted in fact, his desertion beginning not later than the time when that letter was written.³

In one or two cases, however, the view is taken rather that where spouses have once voluntarily separated, wilful desertion cannot be predicated afterwards of either party who is

¹ Gatehouse v. Gatehouse, L. R. 1 P. & D. 331; 1 Bish. § 784; Hankinson v. Hankinson, 33 N. J. Eq. 66.

² Hankinson v. Hankinson, 33 N. J. Eq. 66.

³ Ahrenfeldt v. Ahrenfeldt, 1 Hoffman, 47. The circumstances do not very clearly appear in the report of this case.

content to continue absent as originally agreed upon.¹ To this latter view Mr. Bishop does not subscribe; and he refers properly to the suit for restitution of conjugal rights by way of suggesting that, even if such were the English rule, American courts would, with less reason, adopt it, inasmuch as complainants in American courts could not have recourse to that remedy for breaking up the arrangement to live apart.²

"A consent to a separation," says this writer, "is a revocable act; and if parties separate by consent, and one of them afterward, in good faith, seeks a reconciliation, but the other refuses to return; or if they separate for cause, and the cause is removed, but one of them declines to renew the cohabitation; or if a wife, having left her husband without cause, comes back to him, and he will not receive her; or if the husband, after deserting his wife, proposes to renew the cohabitation, and she rejects his proposal, the full statutory period not having elapsed; this is a desertion, by the one refusing, from the time of the refusal. But to entitle a person to a divorce under such circumstances, the offer of return must be made in good faith, it must be free from improper qualifications and conditions, and it must be really intended to be carried out in its spirit if accepted. And in all cases the legal desertion ends with the intent to desert; for instance, it ends when the erring party undertakes to come back and is prevented. If the wife is restrained by her parents from rejoining her husband, the court, on proper application, will remove the restraint."³

§ 528. *Lapse of Statutory Period of Desertion; its Interruption, &c.* — As to the lapse of the statutory period of absence, a desertion once begun is presumed to continue until the contrary appears.⁴ And it has been held that though the spouse, once wilfully deserting, spend part of the time in imprison-

¹ *Fitzgerald v. Fitzgerald*, L. R. 1 P. & D. 604, per Lord Penzance; *Cooper v. Cooper*, 17 Mich. 205.

² 1 Bish. Mar. & Div. § 784. Perhaps the English rule does not differ so greatly from that preferred in the text. See *Gatehouse v. Gatehouse*, L. R. 1 P. & D. 331.

³ 1 Bish. Mar. & Div. 5th ed. § 786, and numerous American cases cited. But see *supra*, § 481, especially as to the barring of the right to have conjugal rights restored by the express terms of articles of separation.

⁴ 1 Bish. Mar. & Div. § 803.

ment, serving out sentences imposed after his departure, this shall not stop the running of that period, to the prejudice of the aggrieved spouse;¹ also that the subsequent insanity of the deserting partner shall constitute no legal barrier.² But where the commitment of one spouse was directly procured by the other, different considerations might arise;³ and so, too, perhaps, where circumstances show that, despite such confinement, the deserting spouse's return to cohabitation was practicable and actually proposed. Payment of an allowance to the wife at any period after her desertion neither prevents nor stops the running of the statute.⁴

After the requisite space of time has elapsed without interruption, the right of the deserted spouse to have a divorce becomes perfect; and a refusal under such circumstances to renew cohabitation amounts to no more than insisting upon taking the course the law permits of, and having the marriage union dissolved.⁵ But if the statutory period was once interrupted, either because of the resumption of cohabitation by mutual assent, or the fact of an offer on the part of the deserting party to return, the computation of time stops, and a barrier is raised. Any later act of desertion must then be reckoned from the commencement of such new desertion, regardless of the prior offence; while the spouse who refuses to cohabit again, upon the other's offer to resume cohabitation, not only becomes debarred from alleging a desertion, but gives to the latter spouse the right of reckoning his or her own period as the party, in point of fact really deserted,⁶ unless, upon a view of all the circumstances, there was good reason why that party should still be forbidden to return.⁷

IV. § 524. *Specified Miscellaneous Causes of Divorce.* — As to the various other causes of divorce which are specified from

¹ *Hews v. Hews*, 7 Gray, 279.

² *Douglass v. Douglass*, 31 Iowa, 421.

³ *Porritt v. Porritt*, 18 Mich. 420.

⁴ *Magrath v. Magrath*, 103 Mass. 577; *Yeatman v. Yeatman*, L. R. 1 P. & D. 489; 1 Bish. Mar. & Div. § 805.

⁵ *Cargill v. Cargill*, 1 Swab. & T. 235; *Benkert v. Benkert*, 32 Cal. 467; 1 Bish. § 810.

⁶ *Gallard v. Gallard*, 23 Miss. 152;

Friend v. Friend, Wright, 639. Mutual treaties and deliberations with a view to resuming intercourse are inconsistent with the theory of continuous desertion. *Rudd v. Rudd*, 33 Mich. 101.

⁷ *Childs v. Childs*, 49 Md. 509. See *post*, as to justification in divorce.

time to time by local statute, these are, for the most part, modifications of the three chief ones already enumerated. With few exceptions, all causes of divorce have one or more of the three leading elements present; there is adultery or cruelty or desertion; or, to speak less literally, sexual infidelity, maltreatment, or the wilful cessation of marital intercourse.

§ 525. **Offences akin to Adultery; Sodomy, &c.**—Of the offence which some statutes prescribe, by way of heightening the plain offence of adultery, we have spoken under that head. Thus the North Carolina statute, instead of divorcing for simple adultery, permits the decree *a vinculo* to be entered in favor of an injured party from whom the other has separated “him or herself, and is living in adultery.” This involves, besides desertion, a sort of habitual state of loose intercourse with a person or persons of the opposite sex. With slight variation a similar rule prevails in Alabama and Louisiana, and perhaps in some other States.¹

Sodomy and other unnatural and bestial practices are referable to this same head of sexual infidelity; and it is observable that, while such offences are scarcely ever mentioned in American divorce acts,² the English Divorce Statute, 20 & 21 Vict. c. 85, specifies them, together with incestuous adultery, bigamous adultery, adultery coupled with cruelty, and rape, as causes of marriage dissolution, on the wife’s petition; all such carnal deeds quite transcending, in its purview, the offence of simple adultery, so far as a husband may have committed it.³

“Gross misbehavior and wickedness repugnant to and inconsistent with the marriage contract” authorizes a divorce under a Rhode Island statute. But it appears that loving and keeping company with another woman is not an offence within this statute, if the intimacy does not extend to adulterous intercourse.⁴

¹ See 1 Bish. Mar. & Div. § 825; *supra*, § 506; *Morris v. Morris*, 20 Ala. 168; *Hansley v. Hansley*, 10 Ire. 506. In Louisiana the offence is that of keeping his concubine in the common dwelling, or openly and publicly elsewhere.

² But in Alabama, and perhaps one or two other States, this cause is specified. *Browne’s Digest of Divorce*, 1, 55.

³ 1 Bish. Mar. & Div. § 65 n., 739.

⁴ *Stevens v. Stevens*, 8 R. I. 567.

§ 526. *Offences akin to Cruelty; Indignities, Conviction, Intemperance, &c.* — As to “offering indignities,” whether it be to a wife’s person, “so as to render her condition intolerable and her life burdensome,” or, in a reciprocal sense, so that either spouse may complain when aggrieved, the object of our numerous local statutes which specify this cause of divorce appears to be to punish conduct which produces, strictly speaking, no apprehension of bodily harm in the complainant, and yet is, so to speak, cruel and unkind. Unfounded charges of unchaste conduct and adultery have been brought under this head, as a cause of divorce by judicial construction,¹ though the phrase “indignities to the person” receives sometimes a more literal interpretation.² But stealthy immoralities on the husband’s part, such as getting a maid servant with child in the wife’s chamber while she was absent, are not admissible allegations, it would appear, under this head;³ publicity seeming to be reckoned an important element in this class of cases, where apprehension of danger was not immediate, so that the offended spouse must have been wounded by being disgraced in the eyes of others.⁴

Conviction of felonious crime, with perhaps actual sentence besides to prison for a considerable length of time, becomes a cause of divorce; partly from the consideration that something like desertion ensues, but more, we think, because of the public indignity sustained by the innocent spouse in consequence, who is forced to endure the ignominy of partner to a convicted felon. Were separation the only ground to allege, it might be argued that if a prisoner were pardoned out before the expiration of his sentence, he might properly resist

“Grossly immoral conduct, rendering impossible the bringing up of the issue of the marriage properly,” is held insufficient cause of divorce in Pennsylvania. *Miles v. Miles*, 76 Penn. St. 357.

¹ 1 Bish. Mar. & Div. § 826; *Cheatam v. Cheatham*, 10 Mo. 296; *Coble v. Coble*, 2 Jones Eq. 392. And such is sometimes the statute specification, as in West Virginia. See *Browne’s Digest*, Part I.

² *Lewis v. Lewis*, 5 Mo. 278.

³ *Miller v. Miller*, 78 N. C. 102; *Hooper v. Hooper*, 19 Mo. 355. “Intolerable indignities” towards the husband are insufficient ground for a divorce in Pennsylvania. *Miles v. Miles*, 76 Penn. St. 357.

⁴ The habitual indulgence of violent and ungovernable temper appears to be a specified cause of divorce in Florida. *Browne’s Digest of Divorce*, Part I.

a divorce, but as the law stands he cannot; for the right of divorce becomes complete upon the conviction and sentence.¹ Divorce acts vary in language as to this provision; and we need hardly add that if imprisonment "in the State's prison" be the offence named, a conviction and punishment by sentence elsewhere cannot be relied upon.²

"Gross and confirmed habits of intoxication," "habitual intemperance," and the like expressions, are used in various local codes to indicate that, contrary to rule, the immoderate use of liquors may of itself be treated as a ground of divorce, irrespective of the cruel treatment or neglect which nearly always accompanies it.³ But the codes are cautious, in demanding that the vice must have become a habit, lest a casual offender might not be allowed opportunity to reform, since reformation is doubtless the first point to which the efforts of a faithful spouse should be directed. The contraction of the intemperate habit after matrimony is sometimes made a prerequisite.⁴ Intemperance should have continued for a considerable time to afford alone a ground for divorce to the aggrieved partner; sometimes a term of years is specified. Intemperance of the husband, accompanied by a wasting of his estate and failure to maintain wife and children, is sometimes the condition.⁵ The immoderate use of opium or chloroform, intemperance by eating or inhalation, is not generally imported by such legislation, but only drinking in excess, or the immoderate use of alcoholic liquors.⁶ As to habitual intemperance, however, in that sense, facts and circumstances are duly considered by the court, and frequent and regular

¹ Marrying another man in form after the husband's sentence cannot be alleged as adultery on the wife's part by the husband. *Handy v. Handy*, 124 Mass. 394.

² See *Klutts v. Klutts*, 5 Sneed, 423; 1 Bish. Mar. & Div. § 823; *Martin v. Martin*, 47 N. H. 52. Final conviction is here essential to establish the offence. *Vinsant v. Vinsant*, 49 Iowa, 639. To this, in Louisiana, is added the offence of fleeing from justice when charged with an infamous offence. And in Virginia, conviction of an infamous offence

before marriage, unknown to the other party. *Browne's Digest of Divorce*, Part I.

³ 1 Bish. Mar. & Div. § 813; cases cited *infra*.

⁴ *Porritt v. Porritt*, 16 Mich. 140. This is hardly a fair qualification, unless a dissolute companion was taken in marriage by one who had good opportunity for knowing that the bad habit existed.

⁵ 1 Bish. Mar. & Div. § 814; *McKay v. McKay*, 18 B. Monr. 8.

⁶ 1 Bish. Mar. & Div. § 813.

recurrence of excessive indulgence, though not slight indiscretions, may suffice to establish the habit, without the need of expert testimony or of fine distinctions as to the inebriate's business capacity.¹

"Gross neglect of duty" is a specific cause of divorce under some of our local codes. This, we are to understand, does not comprehend the husband's abandonment and refusal to furnish adequate support to his wife.² But statutes sometimes enumerate specially, among causes of divorce, the gross and wanton and cruel refusal or neglect of the husband, being of sufficient ability, to provide suitable maintenance for his wife.³ The length of time which must elapse in such cases to perfect the complainant's remedy is less, usually, than in ordinary desertion; nor is desertion a requisite, but, on the other hand, the judicial inclination appears to be against permitting mere neglect on the husband's part, without aggravating circumstances, to be thus set up against him;⁴ or a failure to provide, where the wife was not thereby left destitute,⁵ or where the husband has not suitable means or capacity for providing support.⁶ "Cruel and abusive treatment" is a legislative expression which is found superadded to "extreme cruelty," but with what peculiar significance beyond the *ævitia* we have discussed, it would be difficult to say.⁷

§ 527. **Offences akin to Desertion; Joining Shakers; Long Absence; Insanity, &c.** — Passive neglect of duty, if made a ground of divorce under any such phrases as were cited in the last section, might be thought better related to desertion than cruelty, which is usually active and aggressive in operation.⁸ But other statute causes of divorce may here be

¹ *Wheeler v. Wheeler*, 53 Iowa, 511; *Golding v. Golding*, 6 Mo. App. 602; *Mahone v. Mahone*, 19 Cal. 626; *Blaney v. Blaney*, 126 Mass. 205; *Magahay v. Magahay*, 35 Mich. 210; *Haskell v. Haskell*, 54 Cal. 262. As to drunkenness at the marriage ceremony, see *supra*, § 20.

² 1 Bish. Mar. & Div. § 815; *Smith v. Smith*, 22 Kan. 699.

³ *Holt v. Holt*, 117 Mass. 202; 1 Bish. Mar. & Div. §§ 817-821; *Peabody v. Peabody*, 104 Mass. 195.

⁴ *Ib.*

⁵ *Washburn v. Washburn*, 9 Cal. 475; *Holt v. Holt*, 117 Mass. 202.

⁶ *Cram v. Cram*, 6 N. H. 87; *Davis v. Davis*, 87 N. H. 191. In these and various other respects, statutes differ in their statement of the offence.

⁷ *Cowles v. Cowles*, 112 Mass. 298; Cruelty as a cause, *supra*, § 507.

⁸ "Vagrancy" of the husband is a specified cause in the Missouri code. *Brown's Digest*, Part I.

stated which are closely allied to desertion. One of these is the offence of joining the Shakers, or, to speak more exactly, of uniting and continuing with some society which holds the relation of husband and wife unlawful.¹ Under statutes which run thus, it is held that if both husband and wife join the society, and afterwards one of them withdraw, such party may treat a refusal of the other to resume the marital relation as constituting the offence in question.² A specific period of continuance in such society is usually set by such statutes, the lapse of which perfects the right to a divorce.

The absence of one of the spouses for a fixed number of years without "being heard of," when permitted to serve as a ground of divorce, upon due lapse of time and strictness of proof, may be said to furnish to the forsaken partner an opportunity of marrying once more, while relieved of those painful risks as to the validity of the new union which we have considered in connection with bigamous marriages.³

Insanity occurring after marriage, with or without some predisposition insufficient, of course, to invalidate the ceremony, though a misfortune which beclouds many a long conjugal union, is rarely permitted to become legal ground of divorce, notwithstanding the strong social pressure sometimes exerted to have it added to the list.⁴ If the insanity was superinduced by drunkenness, or other cause of itself justifying divorce, such cause might perhaps be alleged. And facts showing great depravity of moral character in the libellee, and abandoned habits, ought not readily to be misconstrued into proof of mere insanity.⁵ A concealed hereditary taint, which breaks out after marriage, is sometimes made cause of

¹ 1 Bish. Mar. & Div. § 822; Dyer v. Dyer, 5 N. H. 271; Mass. Gen. Sts. c. 107, § 6.

² Fitts v. Fitts, 46 N. H. 184.

³ *Supra*, § 25; 1 Bish. Mar. & Div. § 824. This is a cause in Rhode Island. Browne's Digest, Part I.

⁴ Smith v. Smith, 47 Miss. 211; Wertz v. Wertz, 43 Iowa, 534; Powell v. Powell, 18 Kan. 371; Curry v. Curry, 1 Wilson (Ind.), 238. Not even cruel treatment by one of the spouses while insane can be alleged as a ground of

divorce. Wertz v. Wertz, and Powell v. Powell, *supra*. In Kentucky, lunacy of three years' standing, where the result of intemperance or of a concealed hereditary taint, is made cause of divorce. Browne's Digest, Part I. Insanity and idiocy, unknown at marriage, is a specified cause elsewhere; e.g. Mississippi. *Ib.* Insanity at the time of marriage is, of course, cause for nullity. *Supra*, §§ 18-21.

⁵ Hill v. Hill, 27 N. J. Eq. 214.

divorce by our legislatures. Otherwise, as in the case of some physical infirmity visited upon a husband or wife, the burden of the other partner becomes often a hard one; and yet devoted kindness and forbearance not only afford the surer hope of restoring the sufferer, diseased in mind or body, to health once more, but may bring the highest blessings to the patient spouse. The constancy of husband and wife to one another in sickness or health, in accordance with the marriage vow, is the crown of matrimony, and rebellious passion is too mean a flame to burn by its side.

§ 528. *Miscellaneous Causes; Impotency; Withholding Marital Intercourse, &c.*—The refusal of a wife to allow her husband to have carnal intercourse with her, or of a husband to perform the natural functions, offers a situation, in which the law can more confidently pronounce a breach of conjugal duty than apply a wholesome remedy. If the marriage was a recent one, and other accompanying circumstances justify an inference that the case is a genuine one of impotence, a decree of nullity is available.¹ And incapacity at the time of marriage, or impotency, is sometimes specified, under our modern statutes, a cause rather of divorce than nullity.² Beyond this, there is much painful uncertainty as to the means of legal redress.

The English suit for restitution of conjugal rights does not proceed, in these times, to the point of compelling copulation, by direct or indirect means of coercion, though under the old canon law the rule may have been otherwise;³ but the obstinate offender is simply imprisoned for contempt. And where the aggrieved party has taken recourse to divorce proceedings, as parties must in the United States, he has fared scarcely better. A wife's utter denial of sexual intercourse is not "cruelty," or "cruel and abusive treatment," under our divorce acts, such as entitles the husband to a divorce.⁴ Nor does it, under the circumstances we have suggested, go

¹ See *supra*, §§ 22, 23.

² *Supra*, §§ 22, 23. After delay, or usually a time limited, and upon insufficient proof, divorce on this ground

is unavailable. *Shafto v. Shafto*, 28 N. J. Eq. 34.

³ *Orme v. Orme*, 2 Add. Ec. 382.

See 1 Bish. § 778; *supra*, § 497.

⁴ *Cowles v. Cowles*, 112 Mass. 298.

to the original validity of the marriage, so as to furnish a ground for annulling it.¹ In order, however, that no wrong may be without its remedy, and in pursuance of other analogies noted already under the head of desertion, besides a just conception of public policy, we would suggest that, by a slight stretch of statute construction, one partner's denial of sexual intercourse, or perhaps of the opportunity of raising up children, if persisted in wilfully, without some proper excuse such as ill health might furnish, and against the express wishes of the other spouse, might, upon the usual lapse of time, be treated as legal desertion and made a cause for divorce without any more specific statute provision on that point. In more than one late instance, however, where the question has come before a State court, the contrary has been held, and the inference conveyed that, for an unwarranted and persistent refusal of carnal intercourse, our existing laws furnish no sufficient grounds for a divorce, and consequently no redress.²

§ 529. **Miscellaneous Causes; Where Divorce rather than Nullity should be Decreed.** — We have seen that a decree of nullity has long been available in practice, in cases which touch the root of the marriage consummation, as where there was mental or physical incapacity, fraud, force, or error, non-age, consanguinity or affinity, a former spouse living, or other fundamental impediment to the union.³ Now, though all these are to be distinguished in strict sense from causes of divorce, historically and on *a priori* reason, inasmuch as they impeach the marriage itself *ab initio*, our present divorce statutes incline to give the term "divorce" the widest possible scope; and taking into view, moreover, the imperfect matrimonial jurisdiction which American courts may profess to exercise

¹ *Cowles v. Cowles*, 112 Mass. 298.

² *Southwick v. Southwick*, 97 Mass. 327; *Magill v. Magill*, 3 Pittsb. (Pa.) 25. In *Steele v. Steele*, 1 MacArthur, 506, it is, however, intimated that lapse of time might enable such offence to be construed into desertion. As to justification of other offences in return, see next chapter.

Mr. Bishop's views upon this delicate question, expressed in 1 Bish. Mar. & Div. §§ 778, 779, seem to the present writer quite reasonable. And as to the conjugal duty whose gross breach is here committed by such unreasonable denial of intercourse, see *supra*, § 58.

³ Part II. c. 1.

upon ecclesiastical analogies, our legislators frequently specify causes of nullity as in reality causes of divorce, making the same course of procedure substantially for matters inherent to the contract of marriage and those consequent upon the marriage state. Hence, in common parlance, divorce is sought as to one or more of the impediments above mentioned; some of our local divorce statutes, however, making express distinction so that nullity shall be the sentence in the one case and divorce in the other.¹

Such statute provisions do not often extend the cause of divorce beyond that to which the doctrine of nullity properly applies. And even while pronouncing certain marriages void on such grounds, independently of a decree of divorce, courts yet prefer that the decree be rendered, so as to conduce to good order and decorum, and the benefit of the public. In annulment of a marriage, as in divorce, collusion is to be discouraged, and the charge is not to be conceded upon mere admission.²

§ 530. *Miscellaneous Causes; Divorce at Judicial Discretion.* — In very many of the United States, we may here add, pregnancy of the woman by another man at the time of marriage, that fact being concealed from, or perhaps simply unknown to the husband, is specified as cause for divorce or nullity;³ and on the same condition, in Virginia and West Virginia, the fact that the wife was a prostitute before marriage;⁴ and furthermore, in Kentucky, concealment from the other party of any loathsome disease one had at the time of marriage.⁵ The ground upon which all these specified offences appear to rest is that a substantial fraud was perpetrated by the guilty party in the marriage contract, though such stat-

¹ Browne's Digest of Divorce, Part I., shows that impotence or physical incapacity is a specified cause of divorce in nearly all of the States; bigamy in very many; fraud and force in very many; mental incapacity in many; non-age in many; consanguinity and affinity in many.

² 3 Barb. Ch. 132.

³ Browne's Digest of Divorce, Part I. The codes of Alabama, Georgia, Kan-

sas, Kentucky, Mississippi, Missouri, Ohio, Tennessee (where pregnancy is with a child of color), Virginia, and West Virginia, thus provide. Carnal intercourse by the wife before marriage suffices in Maryland. *Id.*

⁴ Browne's Digest of Divorce, Part I.

⁵ *Id.* Or (it is added) the contracting of such disease afterwards.

utes are often to be construed as extending the law of fraudulent concealment.¹

Doubtless, the offended husband, in order to procure a divorce where his wife proves to have been pregnant when he married her, ought to be able to show that the child was not his; and simply on the ground of her fraud, as we have seen, and apart from scandalizing him before the world, proceedings for divorce or nullity are held not maintainable, even though the wife bore a bad character before marriage, or was in fact pregnant by another man, since marriage is permitted to be the gateway to repentance and virtue.²

§ 531. *Miscellaneous Causes; Divorce at Judicial Discretion, or for Incompatibility.* — In a few American States the legislature has invited great abuse of divorce facilities within its local jurisdiction, by further providing that, at the discretion of the court, divorce may be granted “for any other cause.”³ In Maine, too, the Revised Statutes allow a divorce from the bonds of matrimony to be decreed by any judge of the Supreme Court, “when, in the exercise of a sound discretion, he deems it reasonable and proper, conducive to domestic harmony, and consistent with the peace and morality of society.”⁴ An unlimited discretion of this character, though confided more safely to the judiciary, perhaps, than any other department of government, — since in the United States the courts are almost invariably found more conservative than either branch of the legislature, — is, indeed, exceedingly dangerous, the more so that it leaves rights and remedies pertaining to the domestic life precarious, which ought, of all things, to be secure and sacred. And Mr. Bishop has expressed his preference for statutes which leave rather this discretion to be exercised within well defined limits, such, for instance, as permitting divorce to be pronounced in a

¹ On this point see *supra*, § 27.

² *Supra*, § 27. And see *Smith v. Smith*, 8 Oreg. 100; *Long v. Long*, 77 N. C. 304.

³ The statutes of Illinois and Indiana contain such provisions, or did so lately. *Browne's Digest of Divorce*, Part I.

⁴ 1 Bish. Mar. & Div. § 827; Maine

Rev. Stats. of 1871, c. 60. *Brown's Digest of Divorce*, Part I. In Maine, a combination of such wrongs as might each become by a sufficient length of continuance, a ground of divorce under the former law, might all together, under the statute as revised, each continuing a less time, become so. 31 Me. 490.

case which comes within the reason of the causes specified by the legislative intention, though perhaps without its literal expression as illumined by judicial precedents.¹

In one Indiana case, under such a provision, it was said that, in order to enable the court to exercise its discretion, there ought to be an injured party, for to such persons alone relief by divorce could be afforded.² Again, it is said, some cause for divorce is requisite.³ And, generally, we may assume that the discretion to be exercised in such cases is a judicial one, limited by the rules appropriate to tribunals of justice, and not an arbitrary and fluctuating discretion, such as a legislature not unfrequently exercises.⁴ And yet the statute range permitted by acts of this character is so broad that much must be left after all to the conscience of the presiding judge.

In Iowa, whose old code provides that a divorce may be decreed where the parties cannot live in peace and happiness together, it is ruled that the chancellor must be fully satisfied of the facts, and that the moral, social, and mental welfare of the parties and their children requires a permanent separation. Cases might thus arise, however, where the parties were mutually at fault, and yet a divorce would be decreed.⁵

§ 582. *Divorce Total or Partial Pronounced.*—As to the causes we have thus enumerated in this chapter, the local statute must determine whether divorce *a mensa* or *a vinculo* shall be granted, or whether there may be a decree *nisi*, or whether the partial divorce shall ripen into the total afterwards. Judicial discretion is permitted by some codes in this respect, so that in the lighter offences enumerated for divorce from bed and board, the court may at pleasure grant total divorce instead.⁶

¹ 1 Bish. Mar. & Div. § 829.

§§ 880-886; Scroggins v. Scroggins, 8 Dev. 535.

² Curry v. Curry, 1 Wilson (Ind.), 286.

³ Inskip v. Inskip, 5 Iowa, 204.

⁴ Ritter v. Ritter, 5 Blackf. 81.

⁵ Browne's Digest of Divorce, Part I., Wisconsin.

⁶ See, on this point, Ritter v. Ritter, 5 Blackf. 81; 1 Bish. Mar. & Div.

CHAPTER IV.

JUSTIFICATION AND DEFENCE IN DIVORCE.

§ 533. **Justification and Defence on General Principle.** — It is a general principle applicable to all divorce proceedings, that the spouse petitioning for relief must have been both clear of blame and consistent in availing himself or herself of the other's matrimonial delinquency. By "clear of blame," we may mean (1) without substantial fault in causing the offence complained of, and, furthermore (2), free from other misconduct equally reprehensible under the divorce laws. For if both parties have the same right to divorce, the rule is that neither has; since only an innocent spouse may properly ask the court to interpose. If the guilty offender has been forgiven, and upon a condition unbroken, then even the innocent spouse may be precluded from bringing a bill for divorce. Hence, various defences which may be employed against the petitioning spouse, apart from a general denial of the alleged misconduct upon which the petitioner relies. And so flexible is modern divorce procedure found under our codes, that, besides written answers, cross-bills are frequently allowed in aid of the defendant's case, and for the purpose of affirmative relief.¹

§ 534. **Recrimination as a Defence.** — As to recrimination, it is the well-known maxim of equity, whose process, like that before monarchs or legislatures, is invoked by petition or libel, and whose Roman fundamental principles apply to causes in chancery, admiralty, or matrimonial courts alike, that he who comes into court must come with clean hands.

¹ As to libels for divorce, cross-bills, and defence, and pleadings and practice in general under divorce codes, see 2 Bish. Mar. & Div. *passim*, where the whole subject is considered in detail.

And in common-law suits founded in tort, one perceives that a similar exemption from personal fault or negligence must also appear from the evidence in order to enable the plaintiff to recover. As to divorce, such maxims have a very broad application. So that, following the Mosaic and canon law, our courts of matrimonial jurisdiction, plainly disinclined as they always were to rupturing the marriage tie, have consistently held that the spouse who has violated his or her own marriage vows is in no position to complain that the other has done the same.¹ When, therefore, divorce is sought by the one for the other's delinquency, the party who is brought into court may complain of delinquency in bar; and this constitutes recrimination. The line, however, is not drawn with exactness, except where the offence in recrimination balances or overbalances the offence originally complained of.

Thus, where both plaintiff and defendant were guilty of adultery, no matter which offence took place first, or whether adultery was committed under more heinous circumstances or more frequently, by one spouse than the other, the rule is well established that either libellant's suit is barred on that showing.² Adultery, too, is regarded as a good defence for a husband to allege in recrimination against his wife's libel for cruelty, especially if her adultery occurred first;³ and this all the more, perhaps, inasmuch as adultery in a woman is held to be the cardinal sin. But whether cruelty can be set up as recrimination against a libel for adultery, is more doubtful; and in the English ecclesiastical courts prior to the Divorce Statute, the rule appears to have become established that it could not of itself.⁴

§ 535. *Recrimination as a Defence; Subject continued.* — On principle, cruelty should be proper recrimination for cruelty; though such cases can rarely amount to more than

¹ See 2 Bish. Mar. & Div. § 76; 239; *Horne v. Horne*, 72 N. C. 531; *Beeby v. Beeby*, 1 Hag. Ec. 789. Such guilty parties, says Chancellor Walworth, in *Wood v. Wood*, 2 Paige, 108, are "suitable and proper companions for each other."

² 2 Bish. Mar. & Div. §§ 80, 81; *Johns v. Johns*, 29 Ga. 718; *Holmes v. Holmes*, Walk. 474; *Shackett v. Shackett*, 49 Vt. 195.

³ 2 Bish. Mar. & Div. § 80, and cases cited; *Willey v. Willey*, 26 W. R. Bish. § 63 *et seq.*

establishing a quarrel and mutual violence.¹ Nor ought retaliation grossly in excess of the provocation even here to be admitted.² In general, where the statutory offences alleged in the libel and on recrimination are visited by the same total or the same partial decree, recrimination may be allowed to operate as a bar. But upon such points, and as to the degree of reprobation which policy affixes to certain marital breaches, codes differ, and so likewise must decisions. Leniency to a wife's adultery, however, is thought to be of doubtful expediency in codes of good morals. Even in cases where the wife has wilfully denied, on her part, sexual intercourse to her husband, and deliberately thwarted his natural gratification or desire for offspring, courts have declined to admit such unkindness by way of recrimination for the husband's own adultery, or even his desertion.³

Some of our local statutes, however, are so construed that divorce is denied whenever both parties are guilty of any of the enumerated offences punishable alike by divorce from bonds of matrimony.⁴ And to such a principle our American States seem to tend; Massachusetts, for instance, permitting, if not cruelty, at least desertion, to be alleged in recrimination for adultery, though such desertion must have extended over the full statutory period.⁵ This tendency seems most fairly in accordance with a correct apprehension of the recrimination doctrine.

No less evidence is requisite to establish a recriminatory charge made in an answer than would be needful to establish a like charge by cross-bill, or in an original libel for divorce.⁶

§ 586. *Condonation as a Defence.* — Condonation is the conditional forgiveness or remission, by one spouse, of some

¹ *Soper v. Soper*, 29 Mich. 305.

² See *Hale v. Hale*, 47 Tex. 386.

³ See *Rowe v. Rowe*, 4 Swab. & T. 162; *Reid v. Reid*, 6 C. E. Green, 381; *supra*, § 528. This, to be sure, is because such denial is not coequal cause for divorce with adultery or desertion, as codes are drawn.

⁴ *Nagle v. Nagle*, 12 Mo. 53; 2 Bish. § 95.

⁵ *Clapp v. Clapp*, 97 Mass. 581;

Edgerly v. Edgerly, 112 Mass. 53;

Adams v. Adams, 2 C. E. Green, 324;

Wilson v. Wilson, 40 Iowa, 230.

⁶ *Pollock v. Pollock*, 71 N. Y. 137.

And as to the proof in divorce suits generally, see 2 Bish. Mar. & Div. *passim*.

Recrimination is sometimes permitted where offered not so much upon the main issue as to reduce alimony. *Buerfening v. Buerfening*, 23 Minn. 563.

matrimonial offence of which he or she knows the other to be guilty. And the rule is that while the condition of forgiveness remains unbroken by the former offender, condonation, from whatever motive it may have proceeded, remains an absolute barrier to all divorce remedies founded on that particular grievance. To this extent condonation is accordingly available in defence; the offence itself not being necessarily denied.¹

The condition to be usually inferred from the circumstances, and the implied condition which the present doctrine rests firmly upon, is that the offence shall not be repeated. A repetition of the same injury will certainly do away the condonation, and revive the former grievance as matter for divorce. In other words, the injured spouse is presumed to have trusted to the offender's sense of shame and genuine repentance. But does that repentance extend by implication so as to exact from the offender conjugal kindness in all other respects? Upon this point there have been differences of judicial opinion. The English doctrine is, that the condition of condonation for an act of adultery is broken, not only when a new offence of the same nature is committed, but when the guilty husband afterwards practises cruelty, deserts, or otherwise commits a marital offence.² Such a rule of construction it is found desirable to apply when the condoned act would have been visited with total divorce, but that subsequent with only partial divorce, so that the injured party would not otherwise receive just redress for an aggravated wrong. Hence, perhaps, what might seem otherwise a forced construction of the implied compact of forgiveness, but a construction most commonly accepted, nevertheless, in the United States, though not, we apprehend, accepted³ in all parts of this coun-

¹ 2 Bish. Mar. & Div. § 33, and cases cited; *Ferrers v. Ferrers*, 1 Hag. Con. 130; *D'Aguilar v. D'Aguilar*, 1 Hag. Ec. 773; *Johnson v. Johnson*, 4 Paige, 460; *Sewall v. Sewall*, 122 Mass. 156; *Ridgway v. Ridgway*, 29 W. R. 612; *Rogers v. Rogers*, 122 Mass. 423; *Clouser v. Clapper*, 59 Ind. 548; *Warner v. Warner*, 81 N. J. Eq. 225; *Farnham v. Farnham*, 78 Ill. 497.

cases cited; 2 Kent Com. 101; *Sir John Nicholl*, in *Durant v. Durant*, 1 Hag. Ec. 783; *Dr. Lushington*, in *Bramwell v. Bramwell*, 3 Hag. Ec. 618; *Dent v. Dent*, 4 Swab. & T. 106; *Newsome v. Newsome*, L. R. 2 P. & D. 306. The subject is, however, considered almost entirely with reference to adultery followed by cruelty.

² See *Johnson v. Johnson*, 1 Edw. Ch. 489; reversed 4 Paige, 460; but

³ 2 Bish. Mar. & Div. §§ 54-56 and

try, nor ever perhaps needful to insist upon where the later offence may be visited with a decree as full and final as the earlier.

With more confidence it may be added that a new offence kindred to the original need not be proved to the same point of heinousness as the original. Thus, cruelty renewed even slightly, after condonation of such an offence, attests the failure of forbearance the most kind and generous an aggrieved spouse can practice, and so disastrous an experiment may well give rise to the worst apprehensions of danger.¹ Condoned adultery and cruelty, too, may be revived by subsequent misconduct which falls short of adultery.² For the injured spouse, as it was observed in an American case, has a right to judge of the future by the past, and the court will connect the whole of the unfaithful partner's conduct in order to form a correct judgment.³ Judicial inclination, on the whole, is to give to the injured one whose experiment of generosity has thus failed, the ample benefit of the original breach of conjugal duty.

Condonation is, however, a legal deduction more commonly from acts than words; and perhaps under special circumstances the express agreement of the parties, consistently acted upon, may be shown to vary the terms of condonation so as to give its condition greater or less scope; while, at the same time, public policy and the legal disabilities of the mutual contract to which married parties are bound should not be forgotten.⁴

§ 537. *Condonation as a Defence; Subject continued.* — The chief circumstance of importance in all cases of condonation, and an all-important one in cases where the offence was adultery, is that of a permitted cohabitation after knowl-

confirmed once more 14 Wend. 637; Hofmire v. Hofmire, 7 Paige, 60; Odom v. Odom, 86 Ga. 286; 2 Bish. Mar. & Div. §§ 57-59; Warner v. Warner, 31 N. J. Eq. 225.

¹ Robbins v. Robbins, 100 Mass. 150; Westmeath v. Westmeath, 4 Eng. Ec. 238; Nogeas v. Nogeas, 7 Tex. 538; Farnham v. Farnham, 73 Ill. 497.

² Ridgway v. Ridgway, 29 W. R. 612.

³ Threewits v. Threewits, 4 Des. 560. And see Turton v. Turton, 3 Hag. Ec. 838.

⁴ See Newsome v. Newsome, L. R. 2 P. & D. 306, as to express condonation under a separation deed to the extent of obliterating a certain adulterous offence; 2 Bish. §§ 38, 61, 62.

edge of the offence. The general rule is that any cohabitation with the guilty party, after the commission of a matrimonial offence, if it be upon the injured party's knowledge or belief that adultery was committed, will amount to conclusive evidence that the offence in question has been conditionally forgiven.¹ No man, says the law, referring to the case of adultery, that most commonly considered under this head, would take a delinquent wife to his bed unless he had really forgiven her; and the same usually holds true of the wife in these days, where the husband was the delinquent instead. The extent of cohabitation which justifies this presumption of condonation need not amount to a conjugal intercourse long continued after the offence; on the contrary, sexual intercourse subsequently permitted being what the law looks to, for which reason a continuous occupation of the same house together would hardly suffice, if it appeared that husband and wife commenced sleeping separately after the discovery;² since even an unforgiving husband may refuse to be inhuman. According to the weight of authority, an unaccepted offer to resume intercourse is unavailable to the offender as amounting to condonation, until that offer is accepted, and hence the offer itself may meantime be withdrawn.³ The presumption is that spouses occupying the same dwelling-house or place of abode cohabit in the full nuptial sense; but that presumption is not conclusive and admits of rebuttal.⁴

Other circumstances, or express words and acts, may strengthen or weaken, as the case may be, that presumption of condonation which cohabitation of itself affords. Condonation may be inferred, for instance, from neglecting to prosecute a divorce suit already commenced,⁵ or from dismissing it; the result of which, according to the better reason,

¹ 2 Bish. Mar. & Div. § 88, and cases *Christianberry v. Christianberry*, 3 Black. cited; *Beeby v. Beeby*, 1 Hag. Ec. 789; 202.
Delliber v. Delliber, 9 Conn. 288.

² *Dance v. Dance*, 1 Hag. Ec. 794, n.; *Westmeath v. Westmeath*, 4 Eng. Ec. 238; 2 Bish. Mar. & Div. § 46; *Poynter Mar. & Div.* 236; *Rogers v. Rogers*, 122 Mass. 423; *Burns v. Burns*, 60 Ind. 259.

³ *Popkin v. Popkin*, 1 Hag. Ec. 766; *Quarles v. Quarles*, 19 Ala. 868; 2 Bish. Mar. & Div. § 47. But see *Christianberry v. Christianberry*, 3 Black. 202.
⁴ *Westmeath v. Westmeath*, 4 Eng. Ec. 238; 2 Bish. Mar. & Div. § 46; *Poynter Mar. & Div.* 236; *Rogers v. Rogers*, 122 Mass. 423; *Burns v. Burns*, 60 Ind. 259.
⁵ *Walker v. Walker*, 2 Phillim. 153.

would be, not that the plaintiff becomes wholly barred from prosecuting the libel, but that, upon violation of the condition of pardon, a divorce libel may be brought for the earlier as well as the later offence.¹

This cohabitation must have occurred not only after the offence was committed, but after the injured party knew, or had reason to believe, that the other spouse was guilty thereof. Circumstances arousing the innocent partner's suspicions are insufficient; for, while in this frame of mind, one might well avoid altercation for the sake of eliciting better the truth, or perhaps completing the proof essential to a suit so painful in arousing antagonism as that for divorce must always be. Hence it is said that for cohabitation to bar the husband's remedy, it should be continued with his knowledge, not only of the offence committed, but of his ability to prove it.² The knowledge upon which a further cohabitation affords presumption of condonation, however, is probable knowledge as courts usually state it.³ The limitation seems to be thus stated, however, in order that the injured spouse may not stultify himself by believing against evidence; for, after all, judicial investigation should be directed to the point whether the innocent spouse chose to forgive, believing that the exercise of forgiveness was at his option.

Several matrimonial offences may be condoned together; and various secret acts of adultery or habitual adultery, with a certain person or persons, may thus be forgiven without actual knowledge of each distinct act; provided only that the proof be appropriate to a condonation so extensive.⁴ Since, however, condonation must be a voluntary act, continued cohabitation after knowledge of an offence, which is constrained by fear or sickness, or the use of force by the offender, cannot be construed into forgiveness, while that sickness or constraint operates against such spouse's free will.⁵

¹ Sewall v. Sewall, 122 Mass. 156.

See 2 Bish. § 48, commenting upon Smyth v. Smyth, 4 Hag. Ec. 509.

² Quincy v. Quincy, 10 N. H. 272.

And see Lord Stowell, in Elwes v. Elwes, 1 Hag. Con. 289; 2 Bish. § 48; Ellis v. Ellis, 4 Swab. & T. 154.

³ Shelford Mar. & Div. 445; 2 Bish.

§ 40; Dillon v. Dillon, 3 Curt. Ec. 86; Best v. Best, 1 Add. Ec. 411.

⁴ See Rogers v. Rogers, 122 Mass. 448.

⁵ Turner v. Turner, 2 Spinks, 201. Condonation of a wife's adultery with

§ 538. **Condonation as a Defence; Subject continued.** — The rule as to inferences of condonation, however, has always been more stringently enforced against the husband than against the wife, and upheld, moreover, chiefly in instances of discovered adultery on her part. Such infidelities rarely fail to place a wife at the absolute mercy of an offended husband, who by throwing her off will make her a social outcast. The husband who condones his wife's adultery is commonly regarded as a disgraced man. But the wife, in a corresponding case, it has lately been remarked, should be pitied rather than blamed, and, especially where she has no separate means, she may be presumed to yield to circumstances beyond her control and hide her shame in patience, with the hope of reclaiming the offender.¹ Upon such a distinction turn numerous cases which seem to favor the offended wife who cohabits knowingly with an adulterous partner, by declining to draw so readily the presumption that by doing thus she has intentionally condoned and debarred herself conditionally of the right to institute divorce proceedings for the offence.² And yet, the tendency of our times being to place the sexes on an equal footing of right and responsibility, condonation of a husband's adultery, as well as of a wife's, may doubtless be warranted by inference from circumstances of which continuous cohabitation is the chief; and in some instances of the kind the presumption seems to be upheld almost as strongly against the aggrieved spouse of one sex as of the other.³ And, at all events, no wife can be justified in permitting her husband's concubine to share with her the same house and a polluted bed.⁴

That marital control and the power to exercise it are

one person is no defence to an action against another for criminal conversation. *Clouser v. Clapper*, 59 Ind. 548.

¹ *Horne v. Horne*, 72 N. C. 581.

² *D'Aguilar v. D'Aguilar*, 1 Hag. Ec. 733; 2 Bish. Mar. & Div. § 49; *Wood v. Wood*, 2 Paige, 108; *Gardner v. Gardner*, 2 Gray, 484; *Horne v. Horne*, 72 N. C. 581; *Cochran v. Cochran*, 85 Iowa, 477.

³ In *Rogers v. Rogers*, 122 Mass.

423, a full condonation of the husband's prior adulterous misbehavior was deduced from proof that a wife had occupied the same sleeping-room with her husband for three years after discovering that he had a venereal disease, and upon his general admission of marital unfaithfulness.

⁴ *Kirkwall v. Kirkwall*, 2 Hag. Con. 277.

given by God's universal law to man rather than woman, is the fundamental reason, and a sound one, too, for presuming condonation less readily in a wife than a husband. No condonation, as we have suggested, can be effectual unless voluntary. Hence, a disinclination of courts, in the later cases which have raised that issue, to extend the former presumptions arising out of cohabitation to the case of cruelty. And though the wife should continue cohabiting with her husband after his acts of legal cruelty towards her, it is held that reconciliation should not be conclusively presumed as a barrier to divorce from that circumstance;¹ fear, indeed, or the husband's coercion, or the shame of an exposure, may have restrained her; nor is the offence itself such as a generous mind can readily forgive before there is opportunity to forget. We cannot doubt, however, that upon suitable proof of favoring circumstances simply, such as long lapse of time and continuous cohabitation after the cruel act was committed, condonation may be established against a wife as well as a husband, and for this offence as well as any other.² And as to statutory cause for divorce in general, a continuance, or renewal of cohabitation between the parties, may, under favoring accompaniments be construed into condoning the fault; for reconciliation is human nature's own plea against justice wherever the family relation is concerned.³

§ 539. **Condonation; Whether the Condoned Offence can be set up in Recrimination.** — This is found a difficult issue to decide in practice; courts having differed in their views

¹ 2 Bish. Mar. & Div. §§ 50, 51; *Snow v. Snow*, per Dr. Lushington, 2 Notes Cas. Suppl. 1, 15; *Reynolds v. Reynolds*, 4 Abb. (N. Y.) App. 35; *Farnham v. Farnham*, 73 Ill. 497; *Phillips v. Phillips*, 1 Ill. App. 245; *Hollister v. Hollister*, 6 Penn. St. 449.

² See *Gardner v. Gardner*, 2 Gray, 434; 2 Bish. §§ 50, 51.

³ Scarcely any cases are to be found which apply the principle of condonation to desertion and kindred offences, and the inapplication here of cohabitation, except by way of renewed intercourse, is obvious. But in *Kennedy v. Kennedy*, 87 Ill. 250, it was recently

held that where a wife without justification refused for more than two years to go to her husband's new home, the fact of his cohabiting with her on one occasion at her brother's house did not bar him of the right to a decree of divorce.

Statutes are found relative to condonation in North Carolina and Louisiana; chiefly with the view of giving to condonation the effect of an absolute barrier to divorce for the condoned offence. See *Collier v. Collier*, 1 Dev. Eq. 352; *Bienvenu v. Buisson*, 14 La. Ann. 386.

according to the circumstances presented, and local statutes now controlling the subject to some extent.¹ On principle, however, the party forgiven should stand as an innocent party in court if constant to the condition of forgiveness, so that the condoning party could no more use the guilt for recrimination than upon an original suit for divorce. Any other view, as Mr. Bishop has well suggested, would give to a condoning spouse the license of profligacy for the future.²

§ 540. **Connivance as a Defence.** — Connivance being a charge to which any spouse too readily forgiving a matrimonial wrong becomes exposed, a check is thus imposed by law upon too easy condonation. Condonation may be guiltless, but connivance imports guilt. Yet the difference of presumption from circumstances already noticed between husband and wife under the preceding head extends necessarily to the present. Thus, it was lately held in one of the United States, where a wife sued for divorce on the ground of her husband's adultery and desertion with a paramour, that it was no defence for the husband to set up that the wife knew of his criminal acts at the time, continued living with him while he was committing them, and by her own conduct not amounting to an assent gave opportunity for the criminal intimacy to ripen.³ Yet, as to a husband, another State court held almost contemporaneously that where a man discovers his wife in the act of adultery with another, and does not interrupt nor disclose his discovery to either of them, he may be held to have connived at the guilt, and hence may forfeit his right to a divorce.⁴

Connivance, which is a defence most available in cases of

¹ Against allowing recrimination in such form may be cited *Anichini v. Anichini*, 2 Curt. Ec. 210; *Jones v. Jones*, 3 C. E. Green, 38. Cases more inclined to permit such recrimination are *Wood v. Wood*, 2 Paige, 108; *Goode v. Goode*, 2 Swab. & T. 253; *Beeby v. Beeby*, 1 Hag. Ec. 789; *Masten v. Masten*, 16 N. H. 150. See New York Statutes on this point, cited 2 Bish. Mar. & Div. § 99.

² 2 Bish. Mar. & Div. §§ 97-100.

³ *Cochran v. Cochran*, 35 Iowa, 477. And see 2 Bish. Mar. & Div. § 18; *Turton v. Turton*, 3 Hag. Ec. 338; *Kirkwall v. Kirkwall*, 2 Hag. Con. 277; *Angle v. Angle*, 12 Jur. 525, showing that the English cases deal gently with a wife in respect to the circumstantial inference of connivance.

⁴ *Cairns v. Cairns*, 109 Mass. 408.

adultery, though applying in other instances, may be defined as the corrupt consenting of a married party to that offence of the spouse for which such party afterwards seeks a divorce.¹

In principle, where there was no corrupt consenting, there no such defence can be appropriate; but in practice, and where inferences must be drawn largely from circumstantial evidence of a negative character, this corrupt consent will be presumed from passive as well as active encouragement of the offence, and conduct amounting in substance to an estoppel.

§ 541. *Connivance as a Defence; Subject continued.*—To dwell upon the case of the stronger spouse, which is the usual one. If a husband spreads snares for his wife, exposes her purposely to licentious temptation, and surrounds her intentionally with seducers and profligates for her companions, he may well be presumed to be either shamefully indifferent to her virtue, and probably for his own pecuniary gain, or else deliberately planning to get rid of her. All such conduct, though less conclusive of evil intent in a particular instance than offering one's own premises to the paramour, or permitting carnal intercourse to go on uninterrupted, bears upon the main issue, and justifies the strongest presumption against him where all other circumstances correspond.² Mere coolness on his part, or conjugal neglect, or even the cruel abuse of his wife, are circumstances less material, as establishing connivance, nor are they generally admissible; and yet, in connection with more positive testimony of connivance, they might perhaps be put in proof.³ Intention is the point upon which all the light should be directed; and repeated condonation alone may compromise a husband, so as to debar him from obtaining a divorce, especially if misconduct with the same paramour be the repeated offence at issue.⁴ Tolerance of easy virtue in a matrimonial companion, indifference

¹ 2 Bish. Mar. & Div. § 5, and cases cited; *Forster v. Forster*, 1 Hag. Con. 144; *Phillips v. Phillips*, 10 Jur. 829; *Cairns v. Cairns*, 109 Mass. 408.

² 2 Bish. Mar. & Div. §§ 9, 17, and cases cited; *Crewe v. Crewe*, 3 Hag. Ec. 123, 137, per Lord Stowell; *Harris v. Harris*, 2 Hag. Ec. 376; *Timmings v. Timmings*, 3 Hag. Ec. 76; *Bray v. Bray*, 2 Halst. Ch. 628.

³ *Moorsom v. Moorsom*, 3 Hag. Ec. 87; *Austin v. Austin*, 10 Conn. 221; 2 Bish. §§ 19, 20.

⁴ 2 Bish. §§ 22, 23; *Timmings v. Timmings*, 3 Hag. Ec. 76.

and delay over discovered guilt, must be quite different from confirming the suspicion of habitual adultery by waiting and watching for legal proof;¹ and there is a doctrine, which divorce courts admit to some extent, whereby the husband who positively connives at one act of adultery on his wife's part, so as to aid in debauching her, becomes debarred from setting up her subsequent adultery against her.²

§ 542. *Lapse of Time as a Defence.* — Lapse of time appears quite frequently as a material circumstance in connection with the proof elicited for establishing one or another of the main defences we have already considered, in which sense it deserves hardly more than the incidental treatment bestowed upon it in such cases. But lapse of time is found to operate more widely as a bar to divorce proceedings, and such plea may be set up on the usual theory of limitations. "Courts of equity, for the peace of society," it is observed in an American case, "discourage antiquated and stale demands, and, acting on this inherent doctrine, refuse to interfere where there has been a long acquiescence."³ Want of knowledge would, of course, excuse a delay, but the matrimonial offence once discovered or opened to the wronged spouse's knowledge, divorce proceedings should be promptly instituted and pursued; or else, irrespective of positive inference that the wrong has been willingly condoned or connived at, the plaintiff's remedy is lost; and in fact, local statutes are found which fix precise limits of time,⁴ or, as in England, permit the court at discretion to refuse divorce upon "unreasonable delay" in presenting or prosecuting the petition.⁵

§ 543. *Insincerity or Collusion as a Defence.* — Insincerity is a defence which is frequently found asserted in connection

¹ 2 Bish. §§ 21, 22; Cairns v. Cairns, 109 Mass. 408; Stone v. Stone, 1 Robertson, 99. year. Smedley v. Smedley, 30 Ala. 714.

² Hedden v. Hedden, 6 C. E. Green, 61; Stone v. Stone, 1 Robertson, 99.

³ Rawdon v. Rawdon, 28 Ala. 565. See 2 Bish. Mar. & Div. §§ 103-109.

⁴ Five years is a limitation favored in some States. Vallean v. Vallean, 6 Paige, 207. In others the period as to adultery for instance, is as brief as one

⁵ Pellet v. Pellet, 1 Swab. & T. 553; Smallwood v. Smallwood, 2 Swab. & T. 397. Irrespective of statute, courts appear to exercise great latitude of discretion in such matters. *Id.* And the tardy wife is favored above the tardy husband. Cummins v. Cummins, 2 McCarter, 138; Cooke v. Cooke, 3 Swab. & T. 126.

with lapse of time ; as where a fictitious suit was brought to give annoyance, or to raise some abstract point of law. A divorce court, scrutinizing the merits of each case, lest the public suffer some detriment, will throw such cases out of court.¹ Moreover, the rule of good faith pledging the parties to contend in earnest, neither of them asserting or admitting false allegations of matrimonial unfaithfulness, divorce by collusion is discountenanced.²

Such objections to a divorce suit as these, or at all events the latter, are perhaps to be regarded as raised by the public, rather than by a party defendant, who, however, has necessarily the right and the duty of claiming that the charges in the libel are without foundation in point of fact.

CHAPTER V.

DIVORCE PROCEDURE.

§ 544. *Libel or Petition.* — Divorce proceedings are begun by the plaintiff in the proper court and under the proper statute, by means of what is usually called a libel or petition ; that is to say, in the form of a written statement, by the complainant or libellee, of his or her cause of action, and of the relief sought. This libel, which has been of essentially the same character from the earliest times, in English ecclesiastical and admiralty courts, and resembles the bill in chancery, is derived from the Roman civil law, and originates still earlier, probably, in that petition to sovereign authority which has been characteristic of governments pursuing written formulas in all ages. The libel states by way of narrative all

¹ See 2 Bish. Mar. & Div. §§ 110-112, 582; *H. v. C.*, 1 Swab. & T. 605. Suits of nullity for impotence present often the element of prosecution after long lapse of time for purposes of annoyance. See *Lorenz v. Lorenz*, 93 Ill. 376; *Shafto v. Shafto*, 28 N. J. Eq. 84.

² 2 Bish. Mar. & Div. §§ 28-32; *Barnes v. Barnes*, L. R. 1 P. & D. 505. Collusion, in order to impeach a judgment regularly entered, should be clearly and satisfactorily proved. *Hopkins v. Hopkins*, 39 Wis. 167. Strangers cannot impeach the decree of divorce as obtained by collusion, nor can the children. *Baugh v. Baugh*, 87 Mich. 69.

points essential to a right comprehension of the case. This narrative should be specific, clear, and full. The plaintiff's name and description should be given, also the defendant's name and description; the court should be designated and respectfully addressed; the relief desired should be stated, and the grounds upon which that relief is sought; the material facts should be stated with reasonable exactness as to time and circumstances. In every libel for divorce, marriage with the defendant should be alleged; likewise faithfulness on the plaintiff's part, and a sufficient breach of matrimonial duty by the defendant, such breach being set forth; and, in short, every fact which the statute imports as a prerequisite to granting the relief prayed for.¹

Local practice must determine the precise form of the libel, just as local statute defines the substance of divorce remedies. It is the safer course to adhere in the main to statute expression with reference to the matrimonial breach justifying a divorce, and to make all allegations which the statute seems to require. A petition for divorce ought to set forth the causes of the complaint in the words of the statute or their equivalent, and circumstances of time and place with reasonable certainty; in order that the defendant may be apprised of the matrimonial breach complained of and prepare his defence understandingly, and so too, that the court may judge whether, the allegations being proved, the general charge is supported.² But a libellant is not confined to a single ground; for, according to the universal practice in England and the United States, various and distinct wrongs, entitling the aggrieved party to the same sort of relief, whether this be a total or partial divorce, may be united in one libel, each wrong being distinctly stated, and the court granting relief upon one or more grounds, according to the testimony produced.³ But where the statute relief afforded for one wrong is a divorce from bed and board, and for another a divorce from bond of matrimony, the two cannot be united

¹ 3 Law Ecl. Law, 17, 147; Shelf. 480; *Randall v. Randall*, 31 Mich. Mar. & Div. 506; 2 Bish. Mar. & Div. 194.
5th ed. §§ 16, 329, 343.

² 1 Bish. Mar. & Div. § 326, and

³ See *Crawford v. Crawford*, 17 Fla. cases cited.

under one and the same petition, in strict matrimonial practice, though there are States which favor such a procedure, and permit, as in common-law actions, that allegations or counts be united, leaving the court to decide as between them.¹

§ 545. **Parties to the Divorce or Nullity Suit.**—Public policy insists so strenuously upon upholding the marriage relation against all outside of it who may seek to intermeddle, that the only proper libellant is that aggrieved spouse who deliberately chooses to take the responsibility of a matrimonial issue. The libellant ought therefore to sign his libel, as evidence that the momentous responsibility is thus assumed; and in some States such personal signature is expressly required by statute.² Even in case of absence or nonage, rendering, perhaps, the intervention of some third person in the pleadings desirable, courts act with the closest scrutiny into the wishes of the real libellant, and do not permit that of any third person to be substituted.³

On the other hand, ecclesiastical practice has been, where sentence of nullity was sought, to allow any person plainly interested, especially the father of either of the parties, to attack the supposed marriage, and establish its invalidity.⁴ The reasoning of the two cases, nullity and divorce, is, however, quite distinct.

The ancient incapacity of married women being after all a legal fiction, local practice generally permits or requires a wife to sign her own libel;⁵ and the right to petition is held personal also as to an infant spouse,⁶ or to one under guardianship as a spendthrift.⁷ Insanity occasions more perplexity; an insane spouse cannot usually, and ought not, by guardian or otherwise, to be permitted to bring a libel for total divorce, but

¹ 2 Bish. Mar. & Div. §§ 326, 327. Compare, in this respect, *Johnson v. Johnson*, 6 Johns. Ch. 163; and *Young v. Young*, 4 Mass. 430.

² 2 Bish. Mar. & Div. §§ 296, 297; *Philbrick v. Philbrick*, 27 Vt. 786; *Daniels v. Daniels*, 56 N. H. 219. The subscription of an attorney will not suffice, even though that attorney be empowered by letters. *Gould v. Gould*, 1 Met. 382.

³ See *Morgan v. Morgan*, 2 Curt. Ec. 679; *Newcomb v. Newcomb*, 13 Bush, 544.

⁴ 2 Bish. Mar. & Div. § 298, and cases cited.

⁵ 2 Bish. § 302.

⁶ *Besore v. Besore*, 49 Ga. 378.

⁷ *Richardson v. Richardson*, 50 Vt. 119.

whether to defend as libellee in such proceedings is less clear.¹ Statutes undertake to guide our modern procedure on most of these points.

§ 546. *Jurisdiction; Venue; Service or Subpoena.* — No questions under the head of divorce are a source of greater difficulty in the United States at this day than those of conflicting jurisdiction where divorce is granted. To that subject we shall later recur;² but here we may touch upon the fundamental rules of jurisdiction in divorce suits. Domicile of the parties is the great criterion; and what is the matrimonial domicile the reader has already perceived.³ When the party, domiciled in one State or country, goes into another, as is often done for the sake of getting divorce on some ground not admissible within the jurisdiction, the risk is run of finding that divorce of no legal validity. No jurisdiction properly arises without *bona fide* domicile.⁴ But it is sufficient at the present day for divorce that one of the parties be there *bona fide* domiciled, and from that point of view cases may doubtless be discovered, as for instance where desertion has taken place, in which the rule that the wife's domicile shall follow her husband's becomes of necessity inoperative, and she may thus acquire an honest domicile of her own, coextensive with her needs.⁵ The place of marriage⁶

¹ See *Worthy v. Worthy*, 86 Ga. 45; *Bradford v. Abend*, 89 Ill. 78. *Mordaunt v. Mordaunt*, L. R. 2 P. & D. 103, 109, 382, shows English practice averse to permitting a divorce suit to go on whether libellant or libellee be insane. But American cases appear to concede the first part of such a proposition without the second. 2 Bish. Mar. & Div. §§ 305-308; *Broadstreet v. Broadstreet*, 7 Mass. 474; *Rathbun v. Rathbun*, 40 How. (N. Y.) Pr. 828. As to partial divorce, or judicial separation, an insane person may be less readily held incapable of appearing through others as plaintiff or defendant. 2 Bish. *ib.* As to proceedings for nullity, insanity, so far from rendering the suit improper, may furnish the best reason for entertaining it. See *supra*, § 21; *Hancock v. Peaty*, L. R. 1 P. & D. 335.

² See, as to Conflict of Laws, *post*,

³ *Supra*, Part III. c. 1.

⁴ *Thompson v. State*, 28 Ala. 12; 2 Bish. §§ 144-154, and numerous cases cited.

⁵ In *Cheever v. Wilson*, 9 Wall. 103, Swayne, J., says: "The rule is that she [*i. e.* the wife] may acquire a separate domicile whenever it is necessary or proper that she should do so. The right springs from the necessity of its exercise and endures as long as the necessity continues. The proceedings for a divorce may be instituted where the wife has her domicile." See also 2 Bish. Mar. & Div. §§ 155-167, where this subject is fully discussed; *Ditson v. Ditson*, 4 R. I. 87.

⁶ Swayne, J., in *Cheever v. Wilson*, 9 Wall. 103; 2 Bish. §§ 172-179, and cases cited.

and of the offence are not of consequence.¹ A defendant absent from the jurisdiction under such circumstances is to be summoned by advertisement or otherwise, as local practice and the statute may determine; his appearance in defence will cure all imperfections of notice, though it cannot create a jurisdiction which was already wanting;² while proceedings without notice to the libellee, as full as the situation admits, are always to be deprecated.

As to the venue and the court of the particular State which shall try the cause, this is matter of local practice, and is usually clearly defined by local statute.

§ 547. **Cross-Bill; Answer in Defence.** — The procedure in divorce causes, while requiring constant reference to local codes, will be found flexible and well adapted to securing substantial justice throughout. A striking instance of this is found in the facilities afforded the spouse against whom the libel is brought for making a defence. In general, newspaper notice can only be resorted to where, by the libel, it appears that the respondent is out of the State; for, otherwise, personal service or *subpœna* is deemed desirable, if not indispensable, in all cases. As for the response, a written answer of some kind, whether by way of general denial or so as to allege special matter in defence, should be filed by a defendant who means to contest the libel.³ In many States the defendant may now allege, either by way of recrimination or cross-petition, the commission of some offence by the plaintiff, which is equally reprehensible as a cause for divorce. By means of a cross-bill, in fact, either the defence may be aided or affirmative relief sought, so that the right to divorce becomes viewed with reference to both parties alike.⁴ And if both parties have equal right to divorce, neither party has, because neither is innocent.

§ 548. **The Issue and Proof.** — Where a libel in divorce is

¹ 2 Bish. §§ 180–198, and cases cited; *is absent in obedience to his will or Cheever v. Wilson, supra.* confined by him in an asylum. *Newcomb v. Newcomb*, 13 Bush, 544.

² 2 Bish. Mar. & Div. §§ 813–815, and cases cited.

³ 2 Bish. Mar. & Div. § 346, and cases cited.

Divorce proceedings cannot be brought by the husband as against a non-resident or absent wife, when she

⁴ 2 Bish. Mar. & Div. § 816 *et seq.*

taken as confessed, a divorce will not be granted as of course, but the court requires *prima facie* proof of the libellant's charges. In States adhering to chancery forms, reference is sometimes made to a master to ascertain the truth of the charges in the bill; but our local statutes, while contemplating that trial by the court which such procedure suggests, independently of legislation, now permit, usually by consent, or upon motion of either party, or at judicial discretion, that the issue framed by libel and answer shall be submitted to a jury for a verdict.¹ Facts discovered after issue was joined may be alleged by way of amendment according to the usual practice now prevalent.²

CHAPTER VI.

THE DECREE; ALIMONY; AND CUSTODY OF OFFSPRING.

§ 549. *The Judgment or Decree.*—The case having been duly heard upon the proofs submitted,—since no bill of divorce should be granted *pro confesso*, and even jury trials are less a matter of common right than of statute or judicial permission, where the usual principle prevails, inasmuch as the court retains control and exercises full supervision of the proceedings from beginning to end,—judgment,³ if the plaintiff has maintained his or her cause, will be entered in that plaintiff's favor. Such a decree, following the local code, may be *nisi*, or in the nature of a divorce from bed and board, in which case the libellant continues subject to certain disabilities: he cannot marry again without leave of the court, or until the decree *nisi* is made absolute, or else a divorce

¹ 2 Bish. Mar. & Div. § 256.

² 2 Bish. Mar. & Div. § 257. For the evidence properly submitted in the specific causes of divorce, as well as the pleadings and practice of divorce suits in detail, the reader is referred to 2 Bish. Mar. & Div. 5th ed., books XI, XIII.

³ See 2 Bish. Mar. & Div. §§ 256, 257; Sparhawk v. Sparhawk, 120 Mass. 390; Rand v. Rand, 56 N. H. 421. The decree should follow the cause pleaded and the allegations of the bill. Livingston v. Hayes, 43 Mich. 129.

from bond of matrimony follows in due time, and, upon due proceedings, the divorce from bed and board.¹ Divorce proceedings are flexible, to a large decree interlocutory, and further subject in higher courts to appeal, review, and orders for new trial or to vacate.

Since, however, the decree which is finally entered for absolute divorce cannot be set aside without restoring marital relations to the same condition as before, to the distress, perhaps, of parties remarried and of their offspring,² such a decree ought not to be readily vacated, upon request, long after it has been entered, nor ever except for pressing cause, as in fraud, imposition, or an utter want of jurisdiction.³ Save for the enforcement or correction of such judgment,⁴ the entry of a final decree in proceedings for divorce *a vinculo* will terminate the jurisdiction of the court over the subject-matter of the action, and over the parties in respect to all matters involved in it;⁵ and this, even with regard to the claim of alimony, as it is held, though the practice, justified by legislation in many States, allows a judgment for alimony to be revised from time to time, and increased or reduced as change of circumstances may require.⁶

§ 550. *Alimony; Custody of Offspring, &c., in General*. — Indeed alimony, the custody of offspring, and certain other matters branch out of a divorce suit as proceedings purely ancillary to the main issue, distinct, and yet often quite comprehensive of themselves. Jurisdiction of divorce courts for awarding custody of the children is purely of statutory or chancery origin, and ecclesiastical courts never exercised it.⁷ Alimony is a doctrine founded in the common-law obligation

¹ *Norman v. Villars*, L. R. 2 Ex. D. 359; *Whiting v. Whiting*, 114 Mass. 494. *Holmes v. Holmes*, 63 Me. 420; *Lawrence v. Lawrence*, 73 Ill. 577.

494. Remarriage under misapprehension before the decree was made absolute is sometimes regarded with indulgence. *Wickham v. Wickham*, 49 L. J. 70. But the reverse holds true of some decisions. *Moors v. Moors*, 121 Mass. 232. Marriage a second time on the faith of a void decree of divorce may prove likewise perilous. *State v. Armington*, 25 Minn. 29.

² *Comstock v. Adams*, 23 Kan. 513;

³ See *Adams v. Adams*, 51 N. H. 388, and cases cited.

⁴ *Holbrook v. Holbrook*, 114 Mass. 568; *Nichols v. Nichols*, 25 N. J. Eq. 60; *Lord v. Lord*, 66 Me. 265.

⁵ *Kamp v. Kamp*, 59 N. Y. 212.

⁶ See *Hopkins v. Hopkins*, 40 Wis. 462.

⁷ 2 Bish. Mar. & Div. § 526. The English cases under this head arise under Divorce Act of 20 & 21 Vict. c. 85, § 85, and later amendments.

of the husband to support his wife, but is affected in modern times by equity and statutory changes with regard to coverture disabilities.¹

§ 551. *Alimony, Temporary and Permanent.* — Alimony may be defined as the allowance which a husband, by order of the matrimonial court having due jurisdiction, must pay to his wife living separate from him for her maintenance. Alimony is of two kinds: alimony temporary or *pendente lite*, whose object being to provide for the needs of a wife during the pendency of a matrimonial suit, its allowance is granted quite readily, upon petition, whether the husband were innocent or guilty, so long as the party seeking it is really his wife; and at the termination of the suit permanent alimony, which is now awarded, at judicial discretion, under statutes enlarging the old law,² on the theory that the divorced wife should have a regular maintenance from her husband's estate according to her own deserts, his means, and the wrong her late husband has done her.³ If, however, he has done her no wrong, but she herself is the offender, the wife has no right to permanent alimony at all,⁴ for the husband's grievance is enough for him to bear without so burdensome an imposition upon his property apart from his own consent.

§ 552. *Alimony pendente Lite, or Temporary.* — Alimony *pendente lite*, or temporary, is frequently found a matter of statute direction.⁵ Independently of statute, it is allowable, on petition (though some of our American States certainly have held otherwise⁶), at the court's discretion, not only where the wife is plaintiff, but where she is defendant, and chargeable with misconduct;⁷ nor in strict divorce proceedings

¹ See Parts IV., V., *supra*; 2 Bish. Mar. & Div. §§ 369-373.

² Agreeably to the old English ecclesiastical practice of decreeing only divorce from bed and board, no alimony could be awarded upon divorce from bond of matrimony more than upon sentence of nullity. 2 Bish. Mar. & Div. §§ 471-484.

³ 2 Bish. Mar. & Div. § 351.

⁴ 2 Bish. § 877; Palmer v. Palmer, 1 Paige, 276; 3 Bl. Com. 94; sections post. In some States even a guilty

wife may frequently, under the divorce code, procure permanent alimony. 2 Bish. §§ 379, 481-484; Deenis v. Deenis, 79 Ill. 74; Dailey v. Dailey, Wright, 514. But as matter of justice, this ought to be regulated by the husband's own sense of justice or pity.

⁵ 2 Bish. Mar. & Div. §§ 384, 396-402; Webber v. Webber, 79 N. C. 572.

⁶ See 2 Bish. §§ 396-400, on this point.

⁷ Vroom v. Marsh, 29 N. J. Eq. 16; McFarland v. McFarland, 51 Iowa, 505.

alone, but where, likewise, annulment of marriage is sought by husband or wife.¹ Not, however, to enable the wife to prosecute a suit to set aside a divorce;² nor where marriage is neither admitted nor satisfactorily proved, since only a wife has the right to claim it.³ Upon the same principle that a wife should have her legal rights and remedies from the purse which the law commits to the husband, her counsel and solicitor's fees are also allowable by divorce codes and practice, to a reasonable extent, from her husband's means.⁴ On the other hand, temporary maintenance is such, under some codes, that the court may direct either party to contribute to the support of the other.⁵

§ 553. **Permanent Alimony.**—Where nullity is pronounced, or no marriage, or, upon a wife's petition for divorce, she is found in fault and the result of the whole litigation is to grant a divorce to her husband instead, she is not entitled to permanent alimony; for such alimony is not for guilty wives, nor for those who are not properly wives at all.⁶ Permanent alimony varies according to the offence; the means and prospects of the husband; what he received through marriage from his wife; the wife's comparative means and separate property, and like circumstances. A gross sum is sometimes adjudged to a divorced woman as her permanent alimony, especially where vexatious delay is feared.⁷ More often it is

But see *Reeves v. Reeves*, 82 N. C. 348. It is not matter of right, but rests in the sound discretion of the court. *Countz v. Countz*, 30 Ark. 73. Temporary alimony is due the wife, even though the husband's misconduct was the result of insane delusion, as jealousy. *Smith v. Smith*, 38 N. J. Eq. 468.

¹ *Vroom v. Marsh*, 29 N. J. Eq. 15; *Allen v. Allen*, 59 How. (N. Y.) Pr. 27; *Bloodgood v. Bloodgood*, 59 How. (N. Y.) Pr. 42.

² *Wilson v. Wilson*, 49 Iowa, 544.

³ *Collins v. Collins*, 71 N. Y. 269; 80 N. Y. 1.

⁴ The wife is not to contract at pleasure for counsel, but order for compensation is to be requested of the court. *Cook v. Walton*, 38 Ind. 228; *Moe v.*

Moe, 39 Wis. 308; *Newman v. Newman*, 69 Ill. 167; *Ottaway v. Hamilton*, 26 W. R. 788; *Allen v. Allen*, 59 How. (N. Y.) Pr. 27; *De Llamosas v. De Llamosas*, 62 N. Y. 618; *Glenn v. Hill*, 50 Ga. 94; *Jenkins v. Jenkins*, 91 Ill. 167; *Gossett v. Patten*, 23 Kan. 840. As to pledging the husband's credit for the legal expenses, as necessities, see *supra*, § 103; *Ottaway v. Hamilton*, *supra*; 2 Bish. §§ 388-392.

⁵ *Small v. Small*, 42 Iowa, 111.

⁶ 2 Bish. Mar. & Div. §§ 377-484, and cases cited; *supra*, § 551, n.; *Shafer v. Shafer*, 10 Neb. 468; *Everett v. Everett*, 52 Cal. 383. Such alimony is not allowed upon a decree for nullity, independently of statutes conferring the right. 2 Bish. §§ 376, 377.

⁷ *Semrow v. Semrow*, 23 Minn. 214;

fixed at a certain defined proportion, usually from one third to one half of the increase and income of his property and means of support, and made payable by periodical sums.¹ But the rule is not rigid, and regards what is reasonable and just from all the circumstances of the case.²

The English divorce act, 20 & 21 Vict. c. 85, avoids "alimony," with its technical narrowness, by permitting order to be made as for "permanent maintenance."³ And legislation still further extends the provision, whether for temporary or permanent maintenance, or both, so as to embrace distinctly the support of the children.⁴

§ 554. **Alimony; Wife's Needs and Husband's Ability; Enforcement.** — Two elements are material in the award of alimony: the wife's needs and the husband's ability to pay. As to temporary alimony and suit-money, the rule is that no allowance shall be made where the wife has sufficient means of her own;⁵ by which is not meant, however, that the latter must consume the principal of her separate estate, since income is chiefly regarded.⁶ Attachment and execution may issue, and a husband may even be committed for contempt of court if he refuses to pay alimony.⁷ Against the natural

Hamilton v. Hamilton, 37 Mich. 608. Alimony should not be allowed if the complainant is brought within no recognized equity. *Lapp v. Lapp*, 43 Mich. 287. To give all the husband's property as alimony to the wife is unwarranted. *Ross v. Ross*, 78 Ill. 402. But penalty added to the periodical payments, on default, is not an abuse of discretion. *Blankenship v. Blankenship*, 19 Kan. 159.

¹ *McClung v. McClung*, 40 Mich. 493.

² 2 Bish. Mar. & Div. §§ 454-470, and cases cited; *Mytton v. Mytton*, 3 Hag. Ec. 667; *Andrews v. Andrews*, 69 Ill. 609; *Ressor v. Ressor*, 82 Ill. 442; *Gardner v. Gardner*, 54 Ga. 560; *Latham v. Latham*, 30 Gratt. 307.

³ *Bradley v. Bradley*, L. R. 3 P. D. 47. See also *Calame v. Calame*, 25 N. J. Eq. 548.

⁴ See local divorce statutes found in connection frequently with award of

custody of offspring. *Davis v. Davis*, 75 N. Y. 221; *Andrews v. Andrews*, 69 Ill. 609; *Call v. Call*, 65 Me. 407. In general, after a divorce, the primary duty of maintaining the former wife and any child of the marriage still remains with the former husband. *Thomas v. Thomas*, 41 Wis. 229. But as to the wife, her fault, as we have seen, bears upon the issue of her right.

⁵ This applies where they have lived apart, and the wife has provision under articles of separation. *Collins v. Collins*, 80 N. Y. 1. And see, generally, *D'Aguilar v. D'Aguilar*, 1 Hag. Ec. 778; 2 Bish. Mar. & Div. § 394.

⁶ *Miller v. Miller*, 75 N. C. 70.

⁷ This refers more properly to permanent than temporary alimony. *Groves's Appeal*, 68 Penn. St. 143. And see, generally, *Burrows v. Purple*, 107 Mass. 428; *Lester v. Lester*, 63 Ga. 356; *Russell v. Russell*, 69 Me. 336;

inclination on his part to make vexatious delays, the presumption is that he is of sufficient ability to pay. But a husband may purge himself of contempt by showing actual inability and surrendering what he has.¹ Land is sometimes set off for permanent alimony, or a lien upon it decreed as security.² A bond for maintenance or alimony may be taken.³

Allowance of permanent alimony in the original judgment for final divorce cannot afterwards, as a rule, be increased or diminished.⁴ But statute practice frequently permits of a change or modification of the decree of divorce, as affecting alimony by supplementary proceedings, a change of circumstances being shown.⁵

§ 555. *The Custody of the Offspring.* — Another ancillary procedure of great delicacy in a divorce suit relates to the custody of the minor offspring. The court here exercises discretion, as generally in the chancery award of custody; the power being often reserved to open, alter, and modify the decree of divorce in this respect from time to time. There may be temporary custody besides the more permanent award. Children of fourteen and upwards should be consulted as to their wishes, though such wish is not conclusive; while as for those younger, and, most of all, offspring of tender age, the court will exercise ample direction; the true interest of each child furnishing the main principle for judicial guidance. Fault of the one or the other spouse, and the obvious unfitness of either or both to be guardian of the child's morals or maintenance, are considerations; so is the sex of the child. An equal, or nearly equal, division of the offspring is appro-

Pain v. Pain, 80 N. C. 322; *Andrews v. Andrews*, 69 Ill. 609.

¹ *Blake v. People*, 80 Ill. 11.

² *McClung v. McClung*, 42 Mich. 53; *Draper v. Draper*, 68 Ill. 17; *Gallagher v. Fleury*, 36 Ohio St. 590; *Blankenship v. Blankenship*, 19 Kan. 159; *Wiggin v. Smith*, 54 N. H. 213. Rights of intervening parties must be respected in decreeing a lien. *Daniels v. Lindley*, 44 Iowa, 567.

³ *Miller v. Miller*, 64 Me. 484; *Guenther v. Jacobs*, 44 Wis. 354.

⁴ *Mitchell v. Mitchell*, 20 Kan. 665; *Bacon v. Bacon*, 48 Wis. 197.

⁵ *Wilde v. Wilde*, 36 Iowa, 319. Where the local code gives full discretion, alimony for the divorced wife's life may be awarded in such a sense that, though she marries afterwards, the defendant is not relieved from the regular payments. *Shepherd v. Shepherd*, 1 Hun, 240.

Upon this whole doctrine of alimony, consult at length, 2 Bish. Mar. & Div. 5th ed. §§ 389-508.

priate where blame is not great on either side: tender infants and young girls to the mother, boys to the father. The common-law preference of father to mother; an award, perhaps, so that each parent may have access, — all these furnish suggestions, variable according to the circumstances, and calling for both a humane and just exercise of this painful judicial discretion.¹

§ 556. *Agreements between Spouses as to Alimony, discontinuing the Suit, &c.* — Alimony is incidental to matrimonial procedure, and usually requires the court's intervention. And it is accordingly held that an agreement not thus sanctioned between husband and wife pending a suit, that the one shall pay a certain sum as alimony to the other, is purely voluntary and unenforceable by the wife.² But arrangements through a trustee, pending a divorce suit, may be sustained as furnishing a fair equivalent for temporary alimony.³ *Bona fide* and fair settlements relative to permanent alimony, too, are permitted to stand against the opposition of third persons and the wife's solicitor himself.⁴

Agreements for money payment, or notes to the use of the wife through a third party, in consideration of her condonation and a dismissal of her divorce suit, being favorable to marriage, have been upheld.⁵ All arrangements between

¹ See, upon this subject more generally, Schouler's Dom. Rel., Parent & Child. And cf., in the present connection, 2 Bish. Mar. & Div. §§ 525-559, and cases cited. For latest cases see as follows: As to the decree and its modification, which legislation frequently defines, *Harvey v. Lane*, 66 Me. 536; *Sullivan v. Learned*, 49 Ind. 252; *Welch v. Welch*, 88 Wis. 535; *Chandler v. Chandler*, 24 Mich. 176. As to unfitness of either parent, *Brandon v. Brandon*, 14 Kan. 342; *Bennett v. Bennett*, 43 Conn. 342; *Boggs v. Boggs*, 49 Iowa, 190. As to access of both parents, see *Latham v. Latham*, 30 Gratt. 307; *Burge v. Burge*, 88 Ill. 164; *Campbell v. Campbell*, 87 Wis. 206; *English v. English*, 32 N. J. Eq. 738; *Hill v. Hill*, 44 Md. 450. And on other points of the text, *Draper v. Draper*,

68 Ill. 17; *McKim v. McKim*, 12 R. I. 462; *McShan v. McShan*, 56 Miss. 413. A stranger should not be taken. *Hopkins v. Hopkins*, 39 Wis. 167. Welfare of a young child is a paramount consideration, and there are strong reasons why an infant daughter should remain with her mother. *Anonymous*, 55 Ala. 428. Right to services of child and obligation to maintain appear to go together, so that where complete custody is given to the mother, the father becomes relieved of the common-law liability for the child's maintenance. *Husband v. Husband*, 67 Ind. 583.

² *Moon v. Baum*, 58 Ind. 194.

³ *McLaren v. McLaren*, 83 Ga. (Suppl.) 99.

⁴ *Gregory v. Gregory*, 32 N. J. Eq. 424.

⁵ *Phillips v. Meyers*, 82 Ill. 67;

spouses in the position of parties to a divorce suit are, however, to be investigated jealously; and their contract, if unequal, or tending to facilitate a final divorce between them, can hardly be deemed otherwise than contrary to public policy and good morals.¹

CHAPTER VII.

EFFECT OF DIVORCE UPON THE PROPERTY OF THE SPOUSES.

§ 557. *Division of the Present Chapter.*—The effect of divorce upon the property of the spouses deserves our final attention in connection with this general subject. *First*, then, as to the effect of absolute divorce; *Second*, as to the effect of partial divorce.

§ 558. *Effect of Absolute Divorce, or Divorce a Vinculo; English Doctrine.*—*First.* The effect of divorce from bonds of matrimony upon the property rights of married parties is substantially that of death, or rather annihilation. And, save so far as a statute may divide the property or restore to each what he or she had before, or a decree for alimony may fasten directly upon the property in question, the guilt or innocence of either spouse does not affect the case.² This is a topic upon which the common law, from the infrequency of divorce, furnishes no light, except by analogies. The settled usage of Parliament has been to introduce property clauses to the above effect into the sentence of dissolution; regulating the rights and liabilities of the respective parties.³ Even in these cases the rights of divorced parties as to tenancy by the curtesy, chattels real, and rents of the wife's lands are still unsettled;

Adams v. Adams, 81 N. Y. Supr. 401.
See also, as between husband and wife, Reithmaier v. Beckwith, 35 Mich. 110; Burnett v. Paine, 62 Me. 122. But as to enforcing such contracts, see Van Order v. Van Order, 15 N. Y. Supr. 315; Brown v. Brine, 1 Ex. D. 5.

¹ Moon v. Baum, 58 Ind. 194; Muckenburg v. Holler, 29 Ind. 189; Stoutenburg v. Lybrand, 13 Ohio St. 228. And see 2 Bish. Mar. & Div. 5th ed. § 289.

² See Harvard College v. Head, 111 Mass. 209.

³ Macq. Hns. & Wife, 210, 214.

and in general, the consequence by act of Parliament "does not very clearly appear."¹

But under the new English Divorce Act,² it is held in a recent case that where the wife, at the date of the decree of divorce *a vinculo*, was entitled to a reversionary interest in a sum of stock which was not settled before her marriage, and had been the subject of a postnuptial settlement; and after the decree the fund fell into possession; her divorced husband had no right to claim it. Says Vice-Chancellor Wood: "Here the contract has been determined by a mode unknown to the old law, namely, by a decree of dissolution; and, as the husband was unable during the existence of the contract to reduce this chattel into possession, I must hold that the property remained the property of the wife."³ The English doctrine, as thus indicated, is that the same consequences as to property must follow the decree of dissolution by the divorce court, as if the marriage contract had been annihilated and the marriage tie severed on that date. Such, too, was the spirit of later decisions.⁴ And one who obtained a sentence of dissolution of marriage was held, moreover, not liable to be joined in an action for tort committed by his wife during the coverture.⁵

But in settlements and trusts involving intricate family arrangements, the English rule is not yet uniform and positive. The most recent cases show a decided indisposition to forfeit a husband's rights to a trust fund where, at all events, the effect of annihilation would be to disturb the remote right of some innocent party,⁶ or without consideration as to which spouse offended. And in certain causes the Divorce Act⁷ confers the power to modify the marriage settlement upon final sentence. Where application is made for that purpose, the judicial object of thus proceeding is, apparently, to prevent

¹ 2 Bright Hus. & Wife, 306.

⁵ Capel v. Powell, 17 C. B. n. s.

² Stats. 20 & 21 Vict. c. 85; 21 & 22

743.

Vict. c. 108; 23 & 24 Vict. c. 144.

⁶ Fitzgerald v. Chapman, L. R. 1 Ch.

³ Wilkinson v. Gibson, L. R. 4 Eq. 162.

D. 563. Jessel, M. R., here discredits Fussell v. Dowding, and other cases cited *supra*. And see Burton v. Sturgeon, L. R. 2 Ch. D. 818; Codrington v. Codrington, L. R. 7 H. L. 864.

⁴ Pratt v. Jenner, L. R. 1 Ch. 498; Fussell v. Dowding, L. R. 14 Eq. 421; Swift v. Wenman, L. R. 10 Eq. 15; Prole v. Soady, L. R. 3 Ch. 220.

⁷ 20 & 21 Vict. c. 85, § 45.

the innocent party from being injuriously affected in property by the decree.¹

§ 559. *Effect of Absolute Divorce, continued; the American Doctrine.* — In this country, the effect of divorce *a vinculo* is frequently regulated by statute. And in general, and independently of statute, all transfers of property actually executed before divorce, whether in law or in fact, remain unaffected by the decree. For instance, personal *choses* of the wife, already reduced to possession by the husband, remain his.² But as to rights dependent on marriage and not actually vested, a full divorce, or the legal annihilation, ends them. This applies to curtesy, dower, the right to reduce *choses* into possession, and property rights under the statutes of distribution.³ These doctrines are set forth in local codes, which frequently save certain rights, such as the wife's dower where divorce is occasioned by her husband's misconduct. And a provision under an antenuptial contract, which is plainly intended as a substitute or equivalent for dower in case the wife survives the husband, is barred by their divorce.⁴

As to torts a similar rule would probably apply. That is to say, if the wife has received an injury and afterwards becomes divorced from bond of matrimony, she should sue the wrong-doer in her own name without the joinder of her husband;⁵ while for injury committed by her the husband is not to be joined as a party liable in consequence;⁶ finally, the husband's own action, growing out of injury done to his

¹ *Maudslay v. Maudslay*, L. R. 2 P. D. 256. On the decree for dissolution of marriage becoming absolute, it takes effect from the date of the decree *nisi*. *Prole v. Soady*, L. R. 3 Ch. 220.

² 2 Bish. Mar. & Div. 5th ed. § 705 *et seq.*; *Lawson v. Shotwell*, 27 Miss. 680.

³ *Dobson v. Butler*, 17 Mis. 87; 4 Kent Com. 53, n., 54; *Given v. Marr*, 27 Me. 212; *Wheeler v. Hotchkiss*, 10 Conn. 225; *Calame v. Calame*, 24 N. J. Eq. 440; *Hunt v. Thompson*, 61 Mo. 148; *supra*, §§ 422, 451; *Rice v. Lumley*, 10 Ohio St. 596. But see *Wait v. Wait*, 4 Comst. 96.

⁴ *Jordan v. Clark*, 81 Ill. 465. Here divorce was granted to A. for the fault or misconduct of A.'s wife, but the principle of the case was that the wife could only be entitled to receive the provision as A.'s widow. A divorce *a vinculo* obtained by the wife, though for the husband's misconduct, bars dower. *Calame v. Calame*, 24 N. J. Eq. 440. And see *Gleason v. Emerson*, 51 N. H. 405; *Hunt v. Thompson*, 61 Mo. 148. Cf. New York statute, construed in *Schiffer v. Pruden*, 64 N. Y. 47.

⁵ *Chase v. Chase*, 6 Gray, 157.

⁶ This is English doctrine. See *Capel v. Powell*, 17 C. B. n. s. 748.

wife, by virtue of the injury to himself, appears to become impaired.¹

On the other hand, if the husband receives any property of the wife after divorce, she may recover it in a suit for money had and received.² How far on the divorce of the husband his assignee may claim against the wife does not clearly appear; but where the divorce was obtained through his fault, the wife's equitable provision, it seems, will be favorably regarded as against him.³ Divorce takes away the husband's right of administration upon the estate of his divorced wife.⁴

§ 560. **Effect of Absolute Divorce; American Doctrine, continued.**—Such are some of the effects of divorce *a vinculo*. And we may pursue the principle somewhat farther in the light of the latest decisions. Upon the dissolution of the marriage all the husband's claims to the wife's lands, which depended on the marriage, become extinguished, and she is entitled to possession.⁵ And her statutory disability to alienate such lands is removed.⁶ But though she claims to own the conjugal dwelling-house, and has left it because of her husband's adultery, she has no right, independently of legislation, to require him to vacate before divorce is granted, even though consistently refusing to cohabit there.⁷ So, too, the wife cannot be compelled to vacate the matrimonial dwelling while her husband's bill for divorce is pending; but, upon the decree of absolute divorce, her rights to all or any part of the premises ceases, and by remaining she becomes an intruder.⁸ The effect of divorce upon a lease given by hus-

¹ 2 Bish. § 724, and cases cited.

² 2 Bish. Mar. & Div. 714; Legg v. Legg, 8 Mass. 99. See Kintzinger's Estate, 2 Ashm. 455.

³ 2 Bish. § 715, and conflicting cases compared; Woods v. Simmons, 20 Mis. 363; 2 Kent Com. 136 *et seq.*; *supra*, Part IV. c. 4.

⁴ 2 Bish. Mar. & Div. 5th ed. § 725; Altemus's Case, 1 Ashm. 49. See 2 Bish. Mar. & Div. § 717; West Cambridge v. Lexington, 1 Pick. 506; Bufaloe v. Whitedeer, 3 Harr. (Pa.) 182; Babcock v. Smith, 22 Pick. 61; Blaker v. Cooper, 7 S. & R. 500; Miller v. Mil-

ler, 1 Sand. Ch. 108; Clarke v. Lott, 11 Ill. 105. See Marriage Settlements, *supra*.

⁵ Porter v. Porter, 27 Gratt. 590.

⁶ Piper v. May, 51 Ind. 283.

⁷ Chapman v. Chapman, 25 N. J. Eq. 394.

⁸ Brown v. Smith, 83 Ill. 291. But if, with her husband's consent, she keeps possession of lands to which her husband holds the legal title, she is at least a tenant at will, and entitled to a notice to quit. Wilson v. Merrill, 38 Mich. 707.

band and wife, of the wife's separate property, would be to put an end to the husband's interest, but continue the lease as binding upon the wife and those claiming under her.¹

Separate property of a wife settled, or otherwise vested in her, is not to be disturbed by a divorce. Thus, a husband's investment of property owned by his wife at the time of her marriage, as also the permitted proceeds of her separate earnings, in purchasing and improving real estate settled to her separate use, belong to her where creditors' rights have not been impaired;² and hence in case of a divorce granted to her afterwards for her husband's misconduct, his claim upon the fund will not be favorably regarded.³ Deeds of settlement which expressly contemplate the survivorship, at a wife's death, of one who was her husband at the time of her death, by inference exclude from their benefits a man who has ceased to be such before her death, because of a full divorce.⁴

§ 561. *Right of One Divorced Spouse to sue the Other.*—It is held, and upon that principle of sound policy which maintains inviolate the sanctity of the marriage union while discouraging stale and doubtful litigation to which their final and angry rupture might incite one of the married parties, that a divorced wife cannot maintain an action against her divorced husband upon an implied contract arising during coverture,⁵ nor for an alleged assault committed upon her while they were husband and wife.⁶ Such remedies, so far

¹ *Emmert v. Hays*, 89 Ill. 11.

² See *Postnuptial Settlements*, *supra*.

³ *Jackson v. Jackson*, 91 U. S. Supr. 122.

⁴ *Barclay v. Waring*, 58 Ga. 86; *Harvard College v. Head*, 111 Mass. 209.

In the case of a tenancy by the entirety having plain reference to a "survivorship," i. e. because of one's natural death, and not a conjugal survivorship, it would appear that divorce does not disturb the tenancy, but the joint tenancy lasts until one or the other party dies. See *supra*, § 397; *Lash v. Lash*, 58 Ind. 526. And see *Beach v. Hollister*, 76 N. Y. 262; *Ames v. Norman*, 4 Sneed, 688. But it is held

that the estate by entirety ceases so far on divorce as to make the late husband and wife tenants in common. *Harrer v. Wallner*, 80 Ill. 197. And income of property settled during "joint lives" is held to terminate, as in case of death. *Highley v. Allen*, 3 Mo. App. 521. *Sed qu.* Where, however, a conjugal survivorship was plainly specified in the trust, as in the instance of an annuity payable "during the continuance of the marriage," divorce, of course, ends it. *Harvard College v. Head*, 111 Mass. 209. Otherwise, as in case of entirety, the analogy of death does not appear conclusive.

⁵ *Pittman v. Pittman*, 4 Oreg. 298.

⁶ *Abbott v. Abbott*, 67 Me. 304.

as available at all, ought to be sufficiently available at the time the right accrued and during marriage.

§ 562. **Effect of Partial Divorce.** — *Second.* Divorce from bed and board, or *nisi*, produces, however, no such sweeping results; the cardinal doctrine here being that the marriage remains in full force, although the parties are allowed to live separate. Here we must consult the phraseology of local statutes with especial care, in order to determine the respective rights and duties of the divorced parties. Thus the consequence of judicial separation, under the present divorce acts of England, is to give to the wife, so long as separation lasts, all property of every description which she may acquire, or which may come to or devolve upon her, including estates in remainder or reversion; and such property may be disposed of by her in all respects as if she were a *feme sole*; and if she dies intestate it goes as if her husband had then been dead.¹

In this country, independently of statutory aid, the property rights of the parties divorced from bed and board remain in general unchanged. For this divorce is only a legal separation, terminable at the will of the parties; the marriage continuing in regard to everything not necessarily withdrawn from its operation by the divorce.² Thus, the husband still inherits from the wife, and the wife from the husband; the one takes his curtesy, the other her dower; and even the right of reducing the wife's *choses in action* into possession still remains to the guilty husband.³ But chancery, by virtue of its jurisdiction in awarding the wife her equity to a settlement, may, and doubtless will, keep the property from his grasp, and do to both what justice demands.⁴

§ 563. **Effect of Partial Divorce; Subject continued.** — On principle, the husband's right to administer on his wife's estate would seem not to be forfeited by his divorce from bed and board. Nor the wife's on her husband's estate. But it should be remembered that the wife's claim to administer,

¹ Stats. 20 & 21 Vict. c. 85, § 25; 21 Kriger v. Day, 2 Pick. 316; Smodt v. & 22 Vict. c. 108, § 8. See Romilly, Lecatt, 1 Stew. 590; Ames v. Chew, 5 M. R., *In re Insole*, L. R. 1 Eq. 470. Met. 320.

² Dean v. Richmond, 5 Pick. 461; 2 Bish. Mar. & Div. 5th ed. § 728 *et seq.*

⁴ Holmes v. Holmes, 4 Barb. 296; *supra*, § 161.

³ Clark v. Clark, 6 Watts & S. 85;

unlike the husband's, is not superior, but only equal, to that of the next of kin. So, too, in the case of both husband and wife, divorce from bed and board may be thought a good reason why the court should refuse to issue letters of administration to the guilty party, where others are interested in the estate, and the judge has discretion in the matter of appointment.¹

The recent English statutes give the wife, upon sentence of judicial separation, the capacity to sue and be sued on somewhat the same footing as a *feme sole*. The rule in the United States is not uniform; but the tendency is clearly in the same direction.²

§ 564. *Statutory Division of Property upon Divorce.*—We may add, in general, that recent legislation affects this whole subject in many parts of the United States; so that either in connection with a decree for alimony or without it, that court which, in the proper exercise of jurisdiction, divorces the party from bonds of matrimony, makes partition of the property of the spouses with the design of making for the spouses and their children just and equitable provision.³ And our local legislation sometimes provides expressly that, on granting the wife a divorce, the court may reinvest in the wife her property which came to the husband in consequence of the marriage, or part of the husband's estate; nor is this recourse uniformly to be had only when the divorce is an absolute one, though it does not usually extend to women divorced for their own fault.⁴ The legislative right to a portion of the guilty spouse's property is sometimes peremptory in favor of an innocent spouse of either sex.⁵

¹ See 2 Bish. Mar. & Div. 5th ed. Div. §§ 509-519, and cases cited; Whetstone v. Coffey, 48 Tex. 269; Gholston v. Gholston, 54 Ga. 285; Fitch v. Cornell, 1 Sawyer, 156.

² See 2 Bish. Mar. & Div. 5th ed. § 737, and cases cited; Lefevres v. Murdock, Wright, 205; Clark v. Clark, 6 Watts & S. 85.

³ Such statutes differ in details so much that it is useless to recount the local provisions. See 2 Bish. Mar. & Div. §§ 520-524, and cases cited; Allen v. Allen, 48 Conn. 419.

⁵ Wetmore v. Wetmore, 5 Oreg. 469; Wilke v. Wilke, 28 Wis. 296. The husband, under our statutes, may recover, after divorce, for valuable improvements, &c., on his wife's real

§ 565. **Mutual Rights pending Divorce Proceedings.**—The mutual rights of a married pair, pending divorce proceedings, sometimes, though rarely, receive attention in the courts: as, for instance, where a wife receives injuries from a third person while living apart from her husband, and afterwards obtains a divorce.¹ No important decision is, however, to be found under this head, so far as principle is concerned.

estate for which it was originally understood that she would be responsible. *Blake v. Blake*, 64 Me. 177.

¹ See *Peru v. French*, 55 Ill. 317. In matters relating to marriage and divorce, the writer acknowledges his indebtedness to the justly valued treatise of Mr. Bishop. Yet he confesses his inability to follow those who argue that lax divorce laws will mend lax morals; not that either strict or lax divorce laws can fully subdue crime; but because history teaches that loose laws rather stimulate than check marital infidelity; while it is found otherwise with countries where stricter laws have prevailed. To say that crime causes the divorce, not divorce the crime, is illogical; the one acts upon the other in any community. As one's familiarity with death tends to make him rather reckless than serious, ferocious than com-

passionate; and as contact with criminal courts almost inevitably corrupts the young; so the influence of divorces, when of common occurrence, is to deteriorate the national character. When parties united in the solemn responsibilities of marriage can coolly discuss and arrange the preliminaries of final dissolution, and haste to obtain judicial relief, for the purpose of forming a new union, as is sometimes done in our land, they are hardly fitted to discharge nature's highest obligations to one another; certainly they cannot do justice to their children or to society. Thus may marriage lose half its significance by parting with all of its sanctity. And see, as to one's remaining on the other's premises, *Chapman v. Chapman*, 25 N. J. Eq. 394; *Brown v. Smith*, 88 Ill. 291; *supra*, § 560.

PART X.

CONFLICT OF LAWS AFFECTING HUSBAND AND WIFE.

§ 566. *Conflict of Laws considered under three Aspects.*—The conflict of laws may be considered under three chief aspects in the present volume: (1) as affecting marriage; (2) as affecting the rights and duties of the marriage relation; (3) as affecting divorce. These three subjects we shall briefly touch upon.

§ 567. *Conflict of Laws relating to Marriage; Marriage upheld.*—*First.* Concerning the conflict of laws relating to marriage. In England, such cases do not often come before the courts; but with us they are very common, the more so as each State adopts its own system concerning marriage and divorce. Marriage is favored beyond ordinary contracts in all nations. It is an old and well recognized rule (subject as we shall see, however, to some exceptions) that a marriage lawful where celebrated is lawful everywhere; and that a marriage unlawful where celebrated is unlawful everywhere.¹ This rule, public policy, common morality, and the comity of nations demand shall be enforced. Even when parties leave their own State or country, for the express purpose of evading the legal requirements, marry abroad, and then return, the marriage is to be sustained, unless, at all events, fundamental essentials have been thereby disregarded. This doctrine was very liberally applied in England, when the famous *Gretna Green* method of union was pronounced indissoluble.²

¹ Story *Conf. Laws*, §§ 79-81; 2 114; 2 Hag. Con. 443. Where parties married in Scotland, and went through a second marriage ceremony in Belgium, a Belgian divorce which purported to affect the Belgian marriage alone was held to leave the Scotch marriage subsisting. *Birt v. Boutines*, 2 Swab. & T. 67.

² *Compton v. Bearcroft*, Bul. N. P. L. R. 1 P. & D. 487.

So in this country, where persons disqualified by the laws of their own State, cross over into another.¹ In all such cases, the principle of ordinary contracts is disregarded, and the *lex loci contractus* is permitted to prevail over the *lex domicilii*. But this doctrine, although favored by most writers on public law, has not received their unanimous support. Huberus, a continental jurist, maintained—contrary to the view afterwards expressed in *Compton v. Bearcroft*, by the English courts—that where parties go to a foreign country, in order to evade their own laws which require the assent of parent or guardian, their marriage should be deemed invalid; for, he observes, such acts tend *ad eversionem juris*, and should not be encouraged.² This opinion finds favor in France and Holland. And there is a statute in Massachusetts to the same purport.³ But *Compton v. Bearcroft* is good law in England and most parts of the United States.⁴

§ 568. **As to Marriage; Exceptions to Rule of Comity.**—There are exceptions to the rule of comity. Among them are to be classed immoral marriages,—or such as may be considered prohibited by the law of God. No Christian nation would tolerate polygamy within its borders on the plea that the marriage took place in some Asiatic country. Nor would incest be permitted.⁵ Nor, we apprehend, would the marriages of such as are mentally and physically incapable. In *Conway v. Beazley*, the English courts refused to recognize a Scotch divorce, and set aside a second marriage; but the facts showed a clear case of bigamy.⁶ Some difficulties must

¹ *Stevenson v. Gray*, 17 B. Monr. 193; 1 Bish. Mar. & Div. 5th ed. § 355, and American cases cited.

² *De Conflictu Legum*, § 8. See other authorities cited to the same conclusion in *Story Conf. Laws*, § 123. Chancellor Kent intimates his disapproval of the doctrine of *Compton v. Bearcroft*. Note to 2 Kent Com. 91. Burge, in 1 Col. & For. Laws, 194, attempts to reconcile the views of Huberus with the English rule.

³ See *Commonwealth v. Hunt*, 4 Cush. 49.

⁴ *Swift v. Kelly*, 3 Knapp, 257; 1 Eq. 247.

Morgan v. McGhee, 5 Humph. 13; *Wall v. Williamson*, 8 Ala. 48; *Patterson v. Gaines*, 6 How. (U. S.) 560; *Phillips v. Gregg*, 10 Watts, 158; *Fornstall v. Murray*, 1 Bland, 479; 1 Bish. Mar. & Div. 5th ed. § 356.

⁵ *Hyde v. Hyde*, L. R. 1 P. & D. 180; *Story Conf. Laws*, § 114; 1 Burge Col. & For. Laws, 188; 1 Bish. Mar. & Div. 5th ed. §§ 372-376.

⁶ 3 Hag. Ec. 639; 5 Eng. Ec. 242. See also recent cases of *Shaw v. Gould*, L. R. 3 H. L. 55, sustaining *Conway v. Beazley*, *supra*; *Wilson's Trusts*, L. R.

doubtless arise under the conflict of American local statutes relative to the impediments which follow a complete divorce.¹ The reasoning of Lord Chancellor Campbell and other peers in the recent English case of *Brook v. Brook*, which went on appeal to the House of Lords, would seem to carry the exception to the rule of comity so far as to include not only immoral marriages, but marriages in violation of a law of domicile which absolutely forbids such unions everywhere.² The point actually sustained, however, in this case, was the invalidity of a marriage by affinity in a foreign country, where such marriages are lawful; but which have always been regarded as within the prohibition of God's law in England. The doctrine claimed, therefore, seems in reality that each nation shall define God's law for itself. The *lex loci contractus*, we may remark in passing, does not seem of necessity to determine such legal consequences of a foreign marriage as the legitimization of antenuptial offspring.³

A court is bound to take notice of foreign laws, when those laws are clearly established. And in a recent instance the English courts, out of regard for the laws of the nativity and contemplated domicile of foreign subjects who had been married on English soil, disregarded the validity of the marriage under English laws so far as to entertain a petition for pronouncing nullity. Portuguese first cousins had thus married in London in accordance with the requirements of English law. Returning to Portugal they did not cohabit as husband and wife; for by the law of Portugal marriages between first cousins are declared incestuous and null, unless the Pope grants a dispensation. Sir R. Phillimore held that the court of place of contract was not bound to treat the marriage as null.⁴ But upon appeal this decision was reversed.⁵

¹ See *Williams v. Oates*, 5 Ire. 535; *Dickson v. Dickson*, 1 Yerg. 110; *Ponsford v. Johnson*, 2 Blatch. 51; *Smith v. Woodworth*, 44 Barb. 198.

² 3 Sm. & G. 481; s. c. 9 H. L. Cas. 193. See *Sutton v. Warren*, 10 Met. 451; *Stevenson v. Gray*, 17 B. Monr. 198.

³ *Putnam v. Putnam*, 8 Pick. 483. See, on this general subject, Lord

Brougham in *Warrender v. Warrender*, 2 Cl. & F. 488; cases cited in note to 2 Kent Com. 93; references *supra* to treatises of Story, Burge, and Bishop.

The marriage abroad of one attainted of treason is lawful. *Kynnaid v. Leslie*, L. R. 1 C. P. 389.

⁴ *Sottomayor v. De Barros*, 2 P. D. 81.

⁵ *Sottomayor v. De Barros*, 3 P. D.

In Virginia the marriage of a white person and negro is declared void, and hence parties domiciled in Virginia went into the District of Columbia and were there regularly married, no such prohibition there existing; presently returning to their Virginia domicile. The Virginia courts maintained the right of that State to insist upon the essentials of marriage as to its own citizens, and the marriage was declared void, so as to subject the parties to indictment for cohabiting.¹ Thus is seen a further tendency to maintain that while forms and ceremonies of marriage are governed by the laws of the place of celebration, such essentials as public policy may deem fundamental, the State will uphold where such essentials are being violated to the detriment of its social morals, and most especially as against palpable evasions of such policy.²

§ 569. *As to Marriage Invalid where celebrated; Marriage abroad.* — A marriage invalid where celebrated is as a rule invalid everywhere. But this principle, being unfavorable to marriage, is applied with more hesitation than its converse.³ Citizens sojourning abroad, parties made amenable to the general laws of another country and yet retaining customs of their own, *quasi* foreigners who do not forfeit their original allegiance, often have special privileges shown them by the comity of nations. Thus, Protestants in a Roman Catholic country have been allowed to marry after their own forms.⁴

1. It is observable, however, that the marriage itself was not pronounced absolutely void apart from sentence of nullity.

¹ Kinney v. Commonwealth, 80 Gratt. 868.

² These fundamentals, it is said by the courts of such a State, depend upon and are governed by the laws of the country where the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated. Kinney v. Commonwealth, 80 Gratt. 868. Cf. State v. Ross, 76 N. C. 242, and State v. Kennedy, 76 N. C. 251, where such evasion, in a marriage between white and negro contrary to North Carolina laws, is

made the plain point of distinction. The sensitiveness of a sovereignty to its own marriage policy must, in reality, dictate the line of decision in all such perplexing disputes, so long as no recognized umpire determines between States in such matters.

³ Lord Stowell, in Ruding v. Smith, 2 Hag. Con. 371; 4 Eng. Ec. 551, 560.

⁴ But this seems permitted only on the assumption that the local law disqualifies. See 1 Bish. Mar. & Div. 5th ed., with authorities cited, § 390 *et seq.*; Kent v. Burgess, 11 Sim. 361; Lord Eldon, in Lord Cloncurry's Case; Cruise on Dignities, 276. The positive illegality of marriage between a Catholic and Protestant at the place of mar-

Settlers from foreign parts are often permitted to take their national customs with them.¹ There are statutes, both in Great Britain and the United States, which permit citizens to marry abroad in presence of certain accredited representatives of their government, as ministers and consuls; and such marriages are considered lawful, though one of the parties be a foreigner.² Even a marriage contracted on board a vessel on the high seas may be presumed to be of international validity, and should be upheld if possible.³ Whatever may be pronounced by the courts, in the adopted country of an emigrant, a marriage lawful by the laws of his native land, would in his native land generally be upheld, if he had not forfeited his allegiance. And the burden of proof is on whoever affirms the illegality of a marriage between suitable parties, which was solemnized abroad.⁴

§ 570. *Conflict of Laws affecting Marital Rights. — Second.* As affecting the rights and duties of the marriage relation. Story, in his *Conflict of Laws*,⁵ after an extended discussion of the great diversity of laws existing in different countries, as to the incidents of marriage, lays down the following general rules, which are of general application. *First.* Where parties are married in a foreign country, and there is an ex-

riage is not favored; presumptions are to the contrary. *Commonwealth v. Kenney*, 120 Mass. 387; *Philadelphia v. Williamson*, 10 Phila. 176. Presumptions favor marriage generally. See *supra*, §§ 38, 39.

¹ See *Ruding v. Smith*, and 1 Bish. Mar. & Div. *supra*; *Story Conf. Laws*, § 2 a.

² *Lloyd v. Petigean*, 2 Curt. Ec. 251; 7 Eng. Ec. 105; *Loring v. Thorndike*, 5 Allen, 257; 12 U. S. Stats. at Large, 79; 1860, c. 179, § 31. Invading armies carry the matrimonial law of their domicile with them. See 1 Bish. Mar. & Div. 5th ed. §§ 399, 400; *Ruding v. Smith*, *supra*; *Lord Ellenborough*, in *Rex v. Brampton*, 10 East, 282.

³ *Hynes v. McDermott*, 82 N. Y. 41.

⁴ *Ib.*; *Redgrave v. Redgrave*, 38 Md. 93. And see *Blumenthal v. Tannenholz*, 31 N.J. Eq. 194. See also, as to the con-

flict of laws relating to marriage, *Wharton Conf. Laws* (1872), §§ 128-165. Mr. Wharton, in his very scholarly work, maintains that there are three distinct theories on this subject: (1) as generally maintained by English writers and the courts, that matrimonial capacity is determined by the law of the place of marriage; which he considers open to objection; (2) that it is determined by the law of the marrying parties' home; which he also considers open to objection; (3) that, as to marriages at home, capacity is determined by home law, and as to marriages abroad, "by the common law of Christendom;" and this last theory he prefers to the others. *Ib.* §§ 160-165. As to conflict in the mode of celebrating marriage, see *ib.* §§ 169-185.

⁵ *Story Conf. Laws*, §§ 125-183.

press contract respecting their rights and property, present and future, it will be held equally valid everywhere, unless under the circumstances it stands prohibited by the laws of the country where it is sought to be enforced. It will act directly on movable property everywhere. But as to immovable property in a foreign territory, it will, at most, confer only a right of action, to be enforced according to the jurisdiction *rei sitæ*. *Second*. Where such an express contract applies in terms or intent only to present property, and there is a change of domicile, the law of the actual domicile will govern the rights of the parties as to all future acquisitions. *Third*. Where there is no express contract, the law of the matrimonial domicile will govern as to all the rights of the parties to their present property in that place, and as to all personal property everywhere, upon the principle that movables have no *situs*, or, rather, that they accompany the person everywhere. As to immovable property the law *rei sitæ* will prevail. *Fourth*. Where there is no change of domicile, the same rule will apply to future acquisitions as to present property. *Fifth*. But where there is a change of domicile, the law of the actual domicile, and not of the matrimonial domicile, will govern as to all future acquisitions of movable property; and, as to all immovable property, the law *rei sitæ*.¹

He further adds that although in a general sense the law of the matrimonial domicile is to govern in relation to the incidents and effects of marriage, yet this doctrine must be received with many qualifications and exceptions, inasmuch as no nation will recognize such incidents and effects when incompatible with its own policy or injurious to its own interests. So, too, perplexing questions will sometimes arise in determining upon the real matrimonial domicile of parties who marry *in transitu*, during a temporary residence abroad, or on a journey made for that purpose with the intention of returning. But the true principle in such cases is to consider as the real matrimonial domicile the place where, at the time of marriage, the parties intended to fix their abode, and not the place where the ceremony was in fact performed.²

¹ Story Conf. Laws, §§ 184-187. And see *Besse v Pellochoux*, 78 Ill. 285.

² Story Conf. Laws, §§ 189-199, and cases cited. See also 1 Burge Col. &

§ 571. *Conflict of Laws affecting Divorce. — Third.* As to the conflict of laws affecting divorce. This is a subject of the greatest embarrassment at the present day. Foreign judgments ought to be and are respected where the jurisdiction of the foreign courts over persons and subject-matter was complete. But where there was no such complete jurisdiction, there can be no conclusiveness of judgment except within the sovereignty where that judgment was rendered. And hence legal conclusions which may severally differ (1) in the sovereignty which pronounced the judgment, where the bias must be to uphold it; (2) in the sovereignty to which the parties and subject-matter rightfully belonged, whose bias must be, on opportunity, to disregard that judgment; (3) in some neutral sovereignty which must incidentally pass upon the validity of that foreign judgment, and which alone is likely to consider the principles of comity unbiassed.

As to divorce, the bias of different sovereignties must be very strong, since family law is fundamental in society, and

For. Laws, 244-639; Wharton Conf. Laws, §§ 118-121, 166, 187-202. In absence of proof as to the law prevailing in Russia, parties litigating in New York were held to be governed by the New York law in *Savage v. O'Neil*, 44 N. Y. 298. See further *Schurman v. Marley*, 29 Ind. 458; *Dow v. Gould, & Co.*, 31 Cal. 629; *Craycroft v. Morehead*, 67 N. C. 422; *Bank of Louisiana v. Williams*, 46 Miss. 618.

In the absence of any nuptial contract, the effect upon the wife's rights of personal property is held to be governed by the law of the place of intended residence. *Mason v. Homer*, 105 Mass. 116; *Mason v. Fuller*, 36 Conn. 160. If one makes a parol antenuptial agreement in one State, where he was married, and immediately removes to another State, where the contract was to be performed, the validity and effect of the agreement depend upon the law of the latter State. *Davenport v. Karne*, 70 Ill. 465. As to *lex loci* in determining the registry of an antenuptial contract, see *Hicks v. Skinner*, 71 N. C. 539. A postnuptial settlement as to future acquisitions may

be affected by a change of domicile from one country to another. *Fuss v. Fuss*, 24 Wis. 256. A husband's right to be paid dividends on shares of bank stock standing in his wife's name, &c., must be determined by the law of the place where the bank is situated, rather than that of their domicile. *Graham v. Norfolk Bank*, 20 Hun, 826. As between States recognizing the common law and those where community rules prevail, the law of domicile of acquisition may prevail. *Oliver v. Robertson*, 41 Tex. 242; *Kraemer v. Kraemer*, 52 Cal. 302. The validity of a married woman's contract in respect to her separate property is determined by the law of the State where she contracted. *Nixon v. Halley*, 78 Ill. 61. For *lex loci* as to assigning dower, see 1 Washb. 4th ed. 151. As to conflict of laws regarding husband's liability for antenuptial debts, see *De Greuchy v. Wills*, L. R. 4 C. P. D. 362. A wife's liability under the statutes of one State as surety on a note or on other contracts may be enforceable under the *lex fori* elsewhere. *Wright v. Remington*, 41 N. J. L. 48; *Halley v. Ball*, 66 Ill. 250.

public policy touching the facilities for divorce differs widely ; and there is always this which weighs against comity, upon the subject of divorce judgments, that, unlike marriage, divorce is to be discouraged by all wholesome communities. Upon such marital concerns every sovereignty is sensitive and tenacious of its own. And hence, as now so frequently occurs, subjects and citizens who have found divorce laws stringent at home, and consequently sought easier relief abroad, must needs expect any judgment of divorce one thus obtains, viewed, in the country or State to which the parties really belong, with the utmost dislike, and, in all countries or States similarly stringent in divorce legislation, repudiated, unless it appears evident that the foreign judgment was rendered upon due jurisdiction of the case.

§ 572. *As to Divorce ; Conflicts ; English Doctrine.* — In England, jurisdiction, on the one hand, is cautiously assumed over the divorces of subjects from abroad ; and, on the other, foreign divorces of British subjects are readily repudiated ; according to the latest decisions. Thus, where husband and wife were married and resided abroad, and, the husband deserting her, the wife came to England to live, the divorce court recently refused to take jurisdiction of a divorce suit on the wife's behalf, since the husband had never been domiciled in England ;¹ and so, too, where the husband, who was a French subject, acted as a consul in England, and in that country committed adultery.² And while the English divorce courts recognize a Scotch divorce of domiciled persons, who had been married in England³ (for such judgment is pronounced within British jurisdiction), they treat with manifest disfavor a decree of divorce procured in one of the United States, especially if one spouse went to such State without the other, and there was no positive change of domicile or transfer of allegiance.⁴

¹ *Le Soeur v. Le Soeur*, 1 P. D. 139.

² *Niboyet v. Niboyet*, L. R. 3 P. D. 52.

³ *Harvey v. Farine*, L. R. 5 P. D. 153, and cases cited in the elaborate opinion.

⁴ *Briggs v. Briggs*, L. R. 5 P. D. 158 ; *Shaw v. Attorney-General*, L. R. 2 P.

& D. 156. A Turkish divorce, procured by an Ottoman subject who had married an English woman, was not permitted to operate upon the property rights of the latter to the full extent of Turkish law, in *Collis v. Hector*, L. R. 19 Eq. 334.

§ 573. **As to Divorce Conflicts; American Doctrine.**— A course thus guarded, both as to entering decrees of divorce of which foreign jurisdictions might complain, and permitting foreign jurisdictions to dissolve the marriages of native subjects and citizens, is most laudable. But in the United States, there is found a great number of independent State jurisdictions, all professing to recognize the *lex loci* of separate sovereignties, and yet, from another point of view, all parts of the same nation which knows only the American citizen. Divorce laws and procedure so greatly differing in the various jurisdictions, the change of domicile is readily made without, however, the corresponding change of citizenship; and the greatest temptation is thereby afforded to one discontented with the marriage union, to seek in some distant State remedies which in one's own are unavailable.

A decree of divorce thus procured is, of late years, proved to be an insecure voucher of matrimonial status; and viewed by different jurisdictions with favor, distrust, or positive aversion, as the case may be, the party who procured it entails more misery upon himself and others, in the end, perhaps, than if no steps for divorce had ever been taken.

§ 574. **As to Divorce Conflicts; American Doctrine continued.**— The following propositions which are established by our latest American cases, seem to afford, on the whole, a safe generalization under the present head: (1.) A domestic judgment for divorce, rendered by a State court having jurisdiction of the parties and subject-matter, ought not to be attacked or disputed in courts of other States, but should be upheld as regular and valid on the principle of comity, unless reversed or set aside in the same jurisdiction.¹ (2.) Where a husband's domicile is in one State, and the wife acquires a *bona fide* domicile in another, either State has authority to dissolve the relation, so far as concerns the party resident within its limits;² though, as to the extra-territorial effect of either divorce, more remains to be said. (3.) But courts of

¹ Cheever v. Wilson, 9 Wall. 108; ² Wright v. Wright, 24 Mich. 180;
Livingston v. Maryland Ins. Co., 6 Dutcher v. Dutcher, 89 Wis. 651.
Cranch, 274; Hunt v. Hunt, 72 N. Y.
217.

one State are not bound to recognize a judgment of divorce granted by the courts of another State, if in fact the parties were neither of them *bona fide* residents of the latter State at the time of the divorce suit; for to give the courts of any State jurisdiction over the marriage relation, one of the parties at least must have a genuine domicile within its territory, and not a mere residence for the purpose of the divorce. If the parties have neither of them a domicile in the State, a divorce which the courts of that State assume to grant is absolutely nugatory and may be so treated in other States.¹ (4.) Furthermore, without such domicile, the courts of other States are not bound by the recitals of the decree, nor even by the voluntary appearance of the parties (since a collusive divorce is not to be upheld), nor can they be precluded from inquiring into the essential fact of jurisdiction; and a judgment not appearing void on its face may be shown to be void by evidence *aliunde* as to the jurisdictional fact.² (5.) A decree of divorce against a defendant domiciled in another State, without service of process or notice of proceedings, is not entitled, in general, to any effect out of the State where the decree was granted.³ And, whatever the status acquired in the foreign court which pronounces the sentence of divorce, by the fact that both parties voluntarily appear there, it is held in New York that a court of another State cannot adjudge the dissolution of a man's marital relations, so as to bind the State where he remains a citizen, domiciled and actually residing there during the pendency of such judicial proceedings, without making a voluntary appearance, and with no actual notice to him thereof.⁴ (6.) Where, however, the

¹ Sewall v. Sewall, 122 Mass. 156; Gettys v. Gettys, 8 Lea, 260; Cooley, J., in People v. Dawell, 25 Mich. 247; Litowich v. Litowich, 19 Kan. 451; Hood v. State, 56 Ind. 263. Jurisdiction of a divorce suit is not sustained by a residence taken up for the mere purpose of bringing the suit, although continued for the length of time required by law. Whitcomb v. Whitcomb, 46 Iowa, 437. For construction of a Massachusetts statute, see Eaton v. Eaton, 122 Mass. 276.

² People v. Dawell, 25 Mich. 247, per Cooley, J.; Litowich v. Litowich, 19 Kan. 451; Sewall v. Sewall, 122 Mass. 156.

³ Doughty v. Doughty, 28 N. J. Eq. 581, which suggests that jurisdiction perhaps may be based upon a matrimonial status or relationship.

⁴ People v. Baker, 76 N. Y. 78, Church, C. J., dissenting. This case tends to the subversion of foreign divorces obtained by the wife's constructive domicile gained for the purpose of

complaining spouse having a *bona fide* domicile in the State where proceedings were instituted, the other spouse was served with as good notice as the law and circumstances permitted, had full opportunity to appear, and did make voluntary appearance, the divorce ought to be, and probably would be, sustained in other States.¹

The Constitution of the United States provides that full faith and credit shall be given in each State to the records and judicial proceedings of every other State; but this does not preclude an inquiry into fundamental jurisdiction where a divorce has been granted.²

§ 575. *Court without Divorce Jurisdiction may annul its Own Decree.* — The court of the State which renders a decree of divorce, having no jurisdiction of the subject-matter or of the parties, may, of its own accord, annul and set aside that decree in a proper proceeding, begun in due season by the complaining party; and this, notwithstanding the party procuring the divorce has remarried and become a parent.³ And fraud in procuring such divorce may consist in taking up a fictitious residence for the purpose of giving jurisdiction, concealing the commencement of the suit from the defendant, and falsifying testimony.⁴

On the whole, the latest American cases tend to break up the vicious practice prevalent, not many years ago, in various parts of this country, of procuring surreptitious decrees of divorce for extra-territorial purposes. Persons remarrying on

suing. Various States, New York included, provide by statute for the giving of judgment of divorce against a non-resident by substituted service. But while it must be admitted that a State may adjudge the status of its own citizen towards a non-resident, this court resists the operation of that judgment in the borders of the State where that party resides, to the subversion of its own laws and the defeat of its policy, and so as to fix upon that party a status of which his own sovereignty disapproves. And see *Love v. Love*, 10 Phila. 453; *Platt's Appeal*, 80 Penn. St. 501; *Simonds v. Simonds*,

103 Mass. 572. Cf. *Burien v. Shannon*, 115 Mass. 438. As to giving notice not as good as might have been given, see *Doughty v. Doughty*, 27 N. J. Eq. 315.

¹ *Cheever v. Wilson*, 9 Wall. 108. And see *Hunt v. Hunt*, 72 N. Y. 217, as explained in *People v. Baker*, 76 N. Y. 78; *Loud v. Loud*, 129 Mass. 14.

² *Sewall v. Sewall*, 122 Mass. 156; *People v. Dawell*, 25 Mich. 247.

³ *Willman v. Willman*, 57 Ind. 500; *Whitcomb v. Whitcomb*, 46 Iowa, 437.

⁴ *Whitcomb v. Whitcomb*, 46 Iowa, 437.

the faith of such decrees have been subjected, in the State of actual domicile, to prosecution for bigamy.¹

¹ *People v. Dawell*, 25 Mich. 247; see 2 Bish. Mar. & Div. §§ 113-214. *People v. Baker*, 76 N. Y. 78. For a discussion in detail of the *lex loci*, see *As to the validity of a foreign decree for alimony*, see *Prosser v. Warner*, 47 Story's and Wharton's treatises on Vt. 667. Conflict of Laws; and as to divorce,

APPENDIX.

SUMMARY OF RECENT MARRIED WOMEN'S ACTS.

A.—IN ENGLAND.¹

Liability of husband of female shareholder; 25 & 26 Vict. c. 89, § 78. — Chancery, &c., decision of disputes between husband and wife as to certain separate property of wife; 33 & 34 Vict. c. 93, § 9. — Insurance by wife on life of herself or husband; insurance by husband for benefit of wife and children; 33 & 34 Vict. c. 93, § 10. — Respective liabilities of husband and wife for wife's debts, and torts committed by wife before marriage; 33 & 34 Vict. c. 93, § 12; 37 & 38 Vict. c. 50. — Lease by tenant by curtesy, in dower, or in right of wife, &c.; 40 & 41 Vict. c. 18, §§ 46–49, 54–56. — Married woman's disposition of contingent, &c., interests in land; 8 & 9 Vict. c. 106, § 6. — Where husband lunatic, separated, divorced, transported, or otherwise unable to concur; 3 & 4 Will. IV. c. 74, § 91. — Acknowledgment of deeds; 3 & 4 Will. IV. c. 74, §§ 77–91; 17 & 18 Vict. c. 75; 19 & 20 Vict. c. 108, § 73. — Will, when valid; 7 Will. IV. & 1 Vict. c. 26, § 8. — Disclaimer of estate in land; 8 & 9 Vict. c. 106, § 7. — Power to dispose of reversionary interest in personalty, and release power over, and equity to, settlement of personalty, by deed acknowledged; 20 & 21 Vict. c. 57. — Earnings and property protected when deserted by husband; 20 & 21 Vict. c. 85, § 21; 21 & 22 Vict. c. 108, §§ 6–10; 27 & 28 Vict. c. 44. — Married woman as executor or trustee; 21 & 22 Vict. c. 108, § 7. — Her status and rights as to property after judicial separation; 20 & 21 Vict. c. 85, §§ 25, 26. — Rights on conviction of husband for aggravated assault upon her; 41 & 42 Vict. c. 19, § 3. — Wages and earnings of deposits in savings-bank by, annuities granted to, and personal property coming to, during marriage, when to be for her separate use; 33 & 34 Vict. c. 93, §§ 1–9. — Power of, to withdraw from control of husband, property in

¹ Index of Statutes, 7th ed. 1881.

stocks, &c. ; 33 & 34 Vict. c. 93, §§ 3-6. — Rents of land descending to, when for her separate use ; 33 & 34 Vict. c. 93, § 8. — Actions by and remedies of, civil and criminal, for recovery and protection of separate property ; 33 & 34 Vict. c. 93, §§ 9, 11. — Liability of, having separate property, for maintenance of husband and children ; 33 & 34 Vict. c. 93, §§ 13, 14.

B.—IN UNITED STATES.

ALABAMA.

Married woman, antenuptial debts, husband not liable, &c. ; Code (1876), § 2704. — Property previous to marriage, and that entitled to afterwards, her separate estate ; § 2705. — Husband of, trustee of separate estate, entitled to income, &c., exempt from execution for his debts ; § 2706. — Separate property of, how conveyed ; §§ 2707, 2708. — Proceeds of sale, her separate estate reinvested, &c. ; § 2709. — Cannot contract with husband for sale ; § 2709. — Husband of, may receive and receipt for property coming to her ; § 2710. — Estate of, liable for household supplies, &c. ; § 2711. — Liability, how enforced ; §§ 2711, 2712. — May dispose of separate estate by will ; § 2713. — Surviving husband of, distributive share, and life estate in realty ; § 2714. — Surviving her husband, rule as to dower, deficiency or overplus ; §§ 2715, 2716. — May have unfit husband removed in chancery from trust ; §§ 2717, 2718. — Bill pending, husband restrained from intermeddling ; §§ 2719, 2720. — Having young children, may have trustee on intemperate husband's estate to keep from squander ; §§ 2723-2727. — Chancery to allow, when abandoned or having profligate, &c., husband, separate earnings and accumulations ; §§ 2728-2730. — Chancery may likewise allow, to act as free-trader ; § 2731. — May insure husband's life ; § 2733. — May convey real estate, husband being *non comp.* ; Acts 1878-79, p. 187. — Separate estate of, liable for attorney's fees, &c. ; Acts 1879-80, p. 36. — When may claim exemption ; p. 121.

ARKANSAS.

Husband cannot affect wife's right to dower ; Ark. Digest, (1874.) § 2225. — Husband and wife not witnesses, when ; § 2482. — Life of, may be insured by wife ; § 4192. — Not bound on contracts of wife, when ; § 4195. — Not liable for costs in suit by or against wife ; § 4197. — Not to bind out child without wife's consent ; § 4198. — No security required of, on sale of property, when ; § 4202. — Debt of, property of wife not to be sold to pay ; § 4203. — Must be

joined as party with wife, when; § 4487. — Wife may defend for, and for self, when; § 4488. — Deserting, wife may sue and defend in his name, when; § 4489. — May be made party with wife, when, how; § 4490. — Notice on, is service on wife, when; § 4747. — Husband and wife must join, unless suit concerns wife's separate property; § 4487. — When married pending action, husband may be made party; § 4490. — Marriage of executrix, revokes letters; § 35. — Of guardian, when; § 3055. — Effect to revoke will; §§ 5766, 5767. — Marriage of female party to action; § 4490. — Marriage contracts to be in writing; § 4163. — How acknowledged; § 4164. — When recorded; § 4165, &c. — Married woman may insure husband's life, when; § 4192. — What property remains to wife; § 4193. — May bargain and sell, what; § 4194. — What contracts not binding on husband; § 4195. — Deposit in savings-bank, &c.; § 4196. — Property of husband not liable for costs; § 4197. — Execution against, how enforced; § 4199. — May give bond in separate suit; § 4200. — List of real estate to be recorded, how; § 4201. — No security required of husband on sale, when; § 4202. — Property of, not liable for husband's antenuptial debts; § 4203. — Letters testamentary or of administration not to issue to; § 9. — May convey her real estate, how; §§ 838, 849. — May relinquish dower, how; §§ 839, 849. — Committing crime under husband's coercion; § 1233. — Maiden name restored to, when; § 2203. — Not to be guardian of estate of minor; § 3055. — May be guardian of person of minor; § 3055. — Exception in favor of, in statute of limitations; §§ 4113, 4130. — Husband must join with in action, except; § 4487. — May sue and be sued alone, when; § 4487. — May defend for self and for husband, when; § 4488. — If deserted by husband, may sue or defend in his name, when; § 4489. — Husband may be made party with, when, how; § 4490. — Record of schedule lost, restored, how; § 4867. — May make will; § 5762. — Property of, may remain separate estate; § 5762.

CALIFORNIA.

Abduction of husband or wife; Hittell's Code (1876), § 5049. — Husband to select residence; § 5103. — Wife to conform to selection or she commits desertion; § 5103. — If unfit, and wife refuses to conform, he commits desertion; § 5104. — Wilful neglect to provide for wife, ground for divorce; § 5105. — Mutual obligations of husband and wife; § 5155. — Husband is head of family; § 5156. — Interest of spouses separate in certain respects; § 5157. — Wife may make contracts; § 5158. — How far spouses may impair their legal obligations; § 5159. — Mutual consent to separation sufficient consideration; § 5160. — Spouses may be joint-tenants or tenants in common; § 5161. — Separate property of wife; §§ 5162, 5163. — Wife may

dispose of separate property without consent of husband; § 5162. — Common property of spouses; §§ 5164, 5687. — Inventory of separate property of wife; § 5165. — Effect of recording inventory of separate property; § 5166. — Wife may contract for payment of money; § 5167. — Wife not liable for debts of husband; § 5168. — Earnings of wife living separate, separate property, § 5169. — Husband not liable for debts of wife contracted before marriage; § 5170. — Wife not liable for debts of husband; § 5171. — Property of wife liable for her own debts; § 5171. — Power of husband over common property; § 5172. — Husband not allowed estate by curtesy; § 5173. — Wife not allowed estate in dower; § 5173. — Husband liable for support of wife; § 5174. — Husband not liable if wife abandons; § 5175. — When wife to support husband; § 5176. — Property rights of wife, how governed; § 5177. — Marriage settlements of wife, how executed; § 5178. — Living separate, neither spouse has superior right to custody of child; § 5198. — Husband not bound to support step-children; § 5209. — Consent of wife necessary for husband to adopt child; § 5223. — Surviving husband or wife may collect deposit in savings-bank, when; § 5579. — Husband cannot select homestead from separate property of wife; § 6239. — Wife must join in conveyance of homestead; § 6242. — Wife, when head of family; § 6261. — Joint tenancy in homestead; § 6265. — Consent of husband not necessary to wife's will; § 6273. — Inheritance between husband and wife; § 6400. — Distribution of common property on death of wife; § 6401. — Distribution of common property on death of husband; § 6402. — Disposition of common property on death of husband; § 6402. — Contract obtained from wife by duress of husband, voidable; § 6569. — Contract obtained from wife by menace voidable, § 6570. — When husband joined with wife as party; § 10370. — Wife may sue alone; § 10370. — Wife may defend in her own right; § 10371. — Wife may be executrix; § 11352. — Wife cannot be administratrix; § 11352. — Sole trader, how wife may become; § 11811. — Application of wife to become; §§ 11812–11821. — Sole trader, responsibilities of wife as; § 11820. — Husband of sole trader; § 11821. — Husband and wife not to testify against each other; § 11881. — Husband and wife, when to testify; 11882. — Battery of wife by husband, how punished; § 13243. — Selling lands under false pretences; § 13534. — When spouses are incompetent witnesses in criminal proceedings; § 14322. — Marriage settlements, how executed, acknowledged, and recorded; §§ 5178–5180. — Married women may become corporators, officers, and members of certain corporations; § 5285. — Stock of, how transferred; § 5325. — Dividends payable to; § 5325. — May hold stock in homestead corporations; § 5561. — In savings and loan corporations; 5575. — Grant by, how acknowledged; § 6093. — Power of attorney acknowledged,

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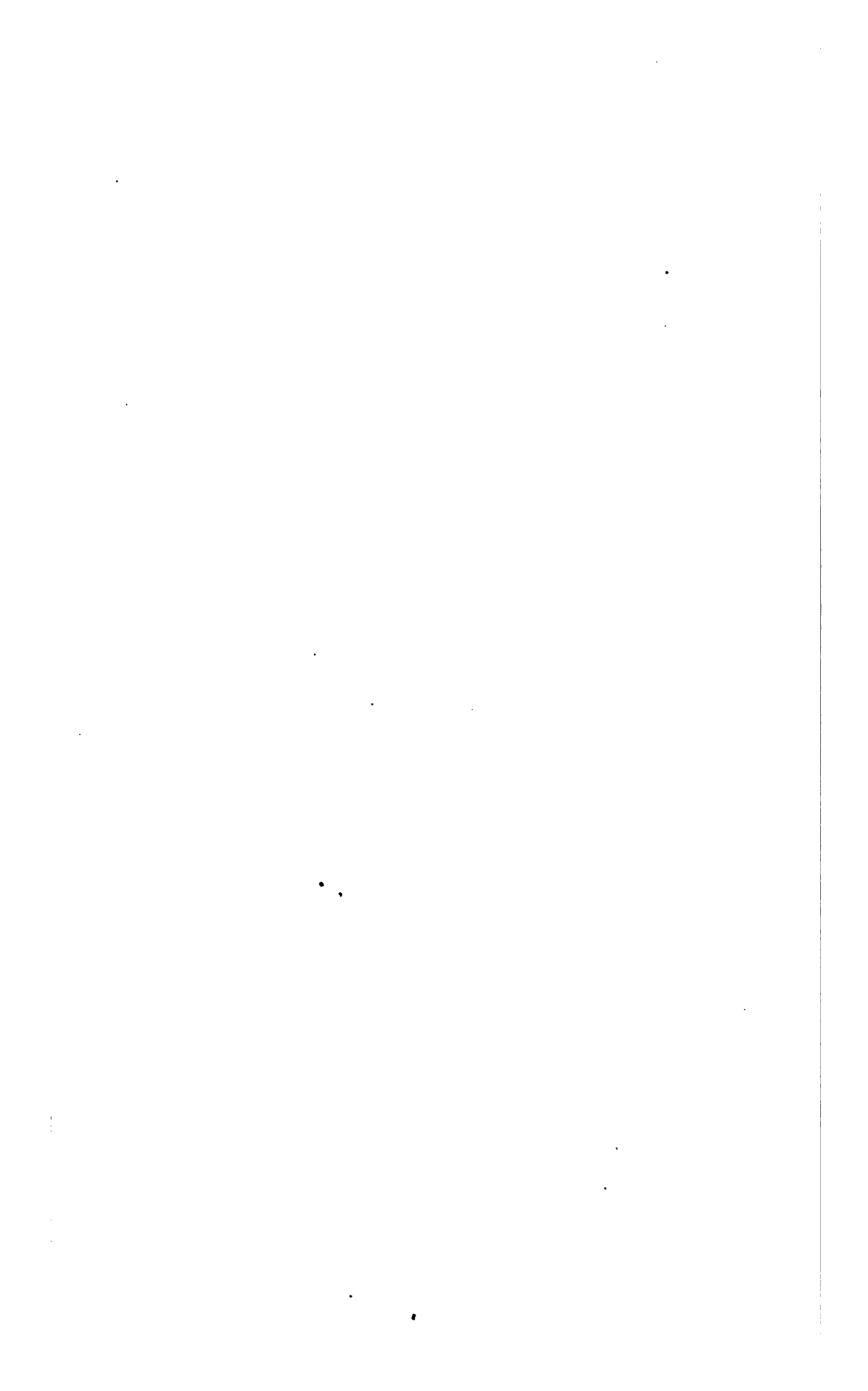
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